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Supreme Court of the United States

October Term, 1973

No. 73-1614

VICTOR R. WOLDER and MARJORIE WOLDER,

Petitioners,

against

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

October Term, 1973

No. ____

VICTOR R. WOLDER and MARJORIE WOLDER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in these proceedings on February 21, 1974, rehearing denied on March 22, 1974.

CITATION TO OPINIONS BELOW

The opinion of the United States Tax Court is reported at 58 TC #74, and is set forth in the Appendix *infra* at page 14a-31a. The decision of the United States Court of Appeals for the Second Circuit affirming the decision of the United States Tax Court as to the appeal of the petitioners (Docket No. 73-1507 in the Court below) and reversing and remanding the cross-appeal of the respondent (Docket No. 73-1847 in the Court below) and affirming the appeal of the respondent in Re: the Marguerite K. Boyce Estate (Docket No. 73-1848 in the Court below) is reported in —— F(2) —— and appears in the Appendix *infra* at

page 1a-12a. Decision by the United States Tax Court in the related case involving the Boyce Estate is set forth in Appendix *infra* at page 32a-36a.

JURISDICTION

The judgment of the United States Court of Appeals was entered on February 21, 1974. A timely petition for a rehearing was filed on March 4, 1974 and was denied on the 22nd day of March, 1974. The jurisdiction of this Court is invoked pursuant to 28 USC Section 1254 and 26 USC Section 7482(a).

QUESTIONS PRESENTED

1. Whether a specific bequest of stock and a general bequest of cash received by petitioner an attorney under his client's Will should be excluded from taxation as a bequest under Section 102 of the Internal Revenue Code of 1954, or whether it constituted taxable income under Section 61 of said Internal Revenue Code as constituting compensation for services rendered although the bequest in the Will is absolute, unrestricted and unconditional.

2. If it be held that the specific bequest of stock is taxable income, as compensation, then is the taxable income to be determined by the value of the stock on the date of decedent's death or the value of the stock on the date that petitioner actually received the stock, or some other date?

3. Further, if it be held that the specific bequest of stock is taxable income as aforesaid, then on a subsequent sale of said stock by the petitioner, is his cost basis for the purpose of determining gain or loss, decedent's date of death value or the value on the date the stock was actually received by him, or some other date?

4. Further, upon a subsequent sale of said stock by peti-

tioner for purposes of determining the holding period of said stock as to whether it is short term or long term capital gain, is the holding period to be measured from the date of decedent's death or the date that petitioner actually received the stock, or some other date?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations concerning gross income are Section 61(a) and (b) of the 1954 Internal Revenue Code (26 USC 61(a), (b)), and regulations Section 1.61-1(a) and (b).

The statutes and regulations concerning the questions of bequest are Section 102 of the 1954 Internal Revenue Code (26 USC 102) and regulations Section 1.102-1.

The statutes and regulations concerning the basis of property acquired from a decedent are set forth in Section 1014 of the 1954 Internal Revenue Code (26 USC 1014) and regulations Section 1.1014-1(a), (b), Section 1.1014-2(a), (b), Section 1.1014-3(a) and Section 1.1014-4(a).

The pertinent portions of said statutes and regulations are set out at length in the Appendix, pages 50a-57a.

STATEMENT OF CASE

A. The Facts:

The material facts are undisputed. Marguerite K. Boyce died July 24, 1965, a resident and domiciliary of New York State. Her Last Will dated April 23, 1965, admitted to probate in Surrogate's Court, New York, in September, 1965, after providing for the payment of her debts and estate taxes and giving certain friends certain specific legacies and cash bequests, gave to petitioner Wolder[1] a general bequest of cash and a specific bequest of stock as follows:

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1. Victor R. Wolder. Marjorie Wolder is a nominal party because a joint income tax return is involved.

"Fifth: * * * (a) I give and bequeath to Victor R. Wolder * * * the sum of * * * $15,845.

(b) Further, I am now the owner of 750 shares of $1 par value Common Stock of Schering Corporation * * * . Therefore, I give and bequeath to said Victor R. Wolder * * * 750 Shares of Common Stock of Schering Corporation which stock I now own * * * and * * * if the said Schering Corporation shall hereafter stock dividends * * * be merged, * * * such other or additional shares or securities * * * as I shall at any time hereafter * * * acquire * * * by virtue of my ownership of the aforementioned shares in the Schering Corporation * * *"

Her residuary estate she gave to others. Mrs. Boyce appointed Wolder and her Bank[2] as Co-Executors and also Wolder as Attorney for her estate. Wolder, under the terms of the Will and of the laws of the State of New York, is separately compensated for his services as Executor and Attorney for the estate. There were no conditions, restrictions, provisions or limitations in the Will that required Wolder to have performed any legal or other services during Boyce's lifetime or for her estate after her death in order to receive the bequest. In October, 1965, Wolder notified his Co-Executor that he elected to accept the legacy under paragraph "Fifth" of the Will. In late December, 1965, he requested the Bank which was then holding the stock in the name of a nominee-custodian in the same form that it had been held during the decedent's lifetime, to deliver the stock to him. On January 13, 1966, the stock was transferred into his name and physically delivered to him on or before January 25, 1966. Under the laws of the State of New York (which the Tax Court so found and the Court of Appeals below does not dispute) where an estate is solvent[3] the specific legatee, as Wolder was,

2. Manufacturers Hanover Trust Company.

3. Mrs. Boyce's gross estate was highly liquid, being nearly all cash and marketable securities, and virtually debt free.

takes title to the stock as of the date of decedent's death, as is and where is. It does not and, in this case, did not become part of the estate administered by the Executors. (See authorities cited in Tax Court opinion, *infra*.)

In late February, 1966, the residuary legatees claimed that by reason of an agreement Wolder had made with the decedent on October 3, 1947, nearly eighteen (18) years before her death and because he was an Executor of the estate, he had a right to the bequests under the Will only if he proved a claim as a debt against the estate in an accounting proceeding under Section 212 of the then Surrogate's Court Act of the State of New York. Highly contested legal proceedings then followed in the Surrogate's Court, the Co-Executors seeking an order permitting them to pay the cash bequest to Wolder as a Legatee under the Will, the residuary legatees countering with a demand that Wolder return the stock to the estate until he proved a claim against the estate. Surrogate DiFalco in September, 1966 (opinion is set forth in Appendix page 37a-42a *infra*), found *as a matter of New York law* that Wolder was entitled to the legacy under the Will, holding that the bequests were " * * * absolute, unconditional and unqualified", that he did not have to return the stock, and that he was entitled to the cash bequest which was then paid to him on November 22, 1966. Again, in 1968 in another Surrogate's Court proceeding highly contested by the residuary legatees and the Attorney General of the State of New York, Surrogate Silverman (excerpt of opinion is set forth in Appendix page 43a-49a *infra*), held that *on all the facts* it was the decedent's " * * * settled and informed intention * * * to make this bequest to "Wolder" and again held that he had a right to retain the stock and the cash bequest that had been distributed to him.

Wolder at no time made any claim against the estate for any services rendered by him to decedent during her lifetime or on any agreement he may have made with the decedent during her lifetime. He did not bill her for any services he rendered to

her during her lifetime, and at the trial testified that at her death she owed him nothing.

The October 3, 1947, agreement which Wolder made with the decedent after reciting (a) that she had become the owner of 500 shares of White Laboratory Stock (not Schering stock or cash) largely from the services of Wolder while he was connected with a law firm that represented her, (b) that Wolder had for some time rendered various legal services for her for which he had made no charge and (c) that she desired Wolder's services without incurring any current charges therefor then provided: *first*, that Wolder agreed " * * * upon Mrs. Boyce's request to render her such legal services as she shall in her opinion require from time to time as long as both shall live and not bill her for such services" and *second*, that Mrs. Boyce agreed to make a codicil to her Last Will reading as follows:

> "I give and bequeath to Victor R. Wolder, or to his estate if he shall predecease me, my 500 shares of Class B Common Stock of White Laboratories Inc., and if said corporation * * * shall be * * * merged, such other * * * securities * * * as I acquire * * * by virtue of my ownership of shares in said corporation; and if any * * * of said * * * securities * * * are disposed of during my life * * * an amount equivalent to the value of the * * * securities * * * disposed of * * * ."

and *third*, that Mrs. Boyce agreed at all times to include as part of her Last Will "a provision identical to that set forth in the preceding paragraph."

The 500 shares of White Laboratories stock were worth between $12,000 and $15,000 at the time the October 3, 1947, agreement was made.

White Laboratories in 1957 merged into the Schering Cor-

poration. Mrs. Boyce received 750 shares of Schering Common and 500 shares of Schering Convertible Preferred Stock for the White Laboratories Stock. In 1964 the Convertible Preferred Stock was redemmed for $15,845.00.

The fair market value of the Schering Stock on July 24, 1965, decedent's date of death, was $46,945.31. On January 13, 1966, it was valued at $63,937.50. The Commissioner had evaluated the stock at $68,625.00 as of February 2, 1966.

Wolder sold the stock between January 31, 1966 and March 17, 1966, in varying amounts.[4]

On its federal estate tax return, the Boyce estate used date of death value, not any alternative date value.

B. Administrative Proceedings and Proceedings in the Courts Below

Respondent, in August, 1966, made a ruling that the bequests to Wolder were (a) deductible as a claim in computing the gross estate of Mrs. Boyce for estate tax purposes, and (b) were includible as taxable income to Wolder.

Wolder, on his 1966 income tax return, claimed that the bequest of cash and stock he received under Mrs. Boyce's Will, were excludible from taxable income because they were bequests, and that in any event, the stock was not income in 1966. Moreover, since Wolder sold the stock in 1966, more than six months after Mrs. Boyce's death, he claimed a long term capital gain of $18,611.25, this being the difference between the amount he received on the sale of the stock, using the decedent's date of

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4. 150 shares on January 31, 1966
100 shares on February 8, 1966
100 shares on February 11, 1966
200 shares on March 9, 1966
200 shares on March 17, 1966

death value as his basis, and decedent's date of death as the date from which his holding period commenced.

Respondent, in his notice of deficiency, determined that the 750 shares of Schering stock constituted taxable income to Wolder in an amount equivalent to its fair market value as of February 2, 1966 (the date respondent alleged that petitioner received the stock) amounting to $68,625. In addition, respondent further determined that the cash distribution of $15,845 also received by petitioner under the Will constituted additional income to petitioner in 1966.

In Wolder's Tax Court case that followed, the Tax Court held (over the dissent of Judge Quealy, before whom the case was tried), that the fair market value of the stock and the cash received under Mrs. Boyce's Will constituted taxable income under Section 61 of the 1954 Internal Revenue Code and was not exempt from taxation as a bequest under Section 102 of the Code.

The Tax Court also held in a separate case involving the respondent against the estate of Mrs. Boyce, that the estate had the right to deduct the bequests to Wolder as a claim against the estate[5] under Section 2053(c)(1)(A) of the 1954 Internal Revenue Code.

It was Wolder's contention in the Tax Court that if the stock were ultimately held to be taxable income to him, then under Section 1014 of the 1954 Internal Revenue Code and the applicable regulations, as well as the various Court of Appeals

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5. The Court of Appeals, in its decision, erroneously states that the Tax Court held that the cash was constructively received by Wolder in 1965. Moreover, Wolder has never personally conceded that if the stock and cash "were taxable income to him, as the Tax Court found in this case, the estate is entitled to deduct the amount of the bequest to him *as a debt* of the decedent client." Wolder in his fiduciary capacity of co-executor of the estate would have to take such a position.

cases and other cases of the State of New York, title to the stock vested in him as of the date of decedent's death.

The Tax Court held that since the bequests to Wolder had their original foundation in the 1947 agreement, the bequests were to be deemed income and not excludable as bequests. The $15,845.00 was taxable in 1966 as the year received but as to the value of the stock, it was not taxable in 1966 but because it was a specific bequest under New York law, it was deemed to have been constructively received by him when he made a demand for same in 1965.[6] Both the petitioner and the respondent appealed to the Court of Appeals and on such appeal the Court of Appeals affirmed petitioner's appeal, but reversed the respondent's appeal holding that the stock was taxable to Wolder in 1966, and remanded the case to the Tax Court.

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6. "Under New York law, petitioner is considered to be a specific legatee of the Schering stock and his rights thereto are determined accordingly. *In re Elliott's Estate*, 76 N.Y.S. 2d 755 (Surr.Ct., N.Y. Co., 1947); *In re Moorhead's Estate*, 65 N.Y.S. 2d 240 (Surr. Ct., N.Y. Co., 1940); *Matter of Strasenburgh*, 136 Misc. 91, 242 N.Y.S. 453 (Surr. Ct., Monroe Co., 1928). Title to the stock vested in petitioner as of the date of decedent's death and all dividends declared thereafter belonged to him. *Matter of Security Trust of Rochester*, 221 N.Y. 213, 116 N.E. 1006 (1917); *Matter of Utica Trust & Deposit Co.*, 148 App.Div. 525, 133 N.Y.S. 145 (3rd Dept. 1911). Cf. *Alfred Harrell, Executor*, 20 B.T.A. 103 (1930). He had the right and power to compel delivery of the Schering stock to himself. N.Y. Surrogate's Court Act, section 218;[1] *Matter of Roth*, 53 Misc. 2d 1066, 281 N.Y.S. 2d 225 (Surr. Ct., N.Y. Co., 1967); *Matter of Schwartz*, 2 Misc. 2d 542, 149 N.Y.S. 2d 638 (Sur.Ct., Kings Co., 1956). Given the liquidity of the estate, the executors could not have been surcharged for making such delivery prior to the expiration of the period for filing of claims against the estate. *Matter of Hostin*, 33 Misc. 2d 206, 207-208, 223 N.Y.S. 2d 893, 894 (Surr.Ct., West.Co. 1961). Indeed, the failure of the executors to consent to such a transfer would have been deemed unreason-

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1. This section has been replaced by N.Y. Estates, Powers and Trusts Law (McKinney's), sec. 11-1.5, effective September 1, 1967.

The Court of Appeals said that the date of transfer of the stock to Wolder was " * * * the date of his actual receipt of the Certificates themselves on or before January 25, 1966" and in a footnote to its decision the Court of Appeals said "On remand, the Tax Court will have to determine the precise date on which Wolder received the stock in order to establish Wolder's exact receipt of income from (and incidentally, correct basis in) the stock, which is its fair market value on the day of delivery of the certificates to him. * * * "

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided a federal question in a way that is in conflict with the decision of this Court in *United States v. Merriam*, 263 U.S. 179 (1923).

Petitioner Wolder, as did the dissenting Judge Quealy in the Tax Court, relied upon *United States v. Merriam*, 263 U.S. 179 (1923), and its progeny for the proposition that the term "bequest" in Section 102(a) has not been restricted so as to exclude bequests made on account of some consideration flowing from the beneficiary to the decedent. *Bank of New York v. Helvering*, 132 F.2d 773 (CA 2d 1943) followed it on the basis that it was controlling law. The Court of Appeals for the Second Circuit, however, has now refused to follow the *Merriam* case and its prior *Bank of New York* decision, holding that the view-

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able, arbitrary, and capricious. *Matter of Schwartz, supra.* Nor did the executors have any responsibility to take possession of the Schering stock in view of the fact that they clearly were not needed to satisfy claims against the estate or expenses of administration. *Matter of Columbia Trust Co.*, 186 App.Div. 377, 174 N.Y.S. 576 (1st Dept., 1919). Finally, they could not (and, in fact, did not in this case) receive commissions with respect thereto. N.Y. Surrogate's Court Act, section 285; *In re Pearsons' Will*, 182 N.Y.S. 2d 129, 131 (Surr. Ct. West. Co. 1958); see *Estate of Abraham Werbelovsky*, 11 T.C. 525, 529-530 (1948)."

point of the Supreme Court is different today from *Merriam* in that in interpreting the application of Section 102(a) or its predecessor, 22(b)(3) of the Internal Revenue Code of 1939 in reference to what are "gifts", the Supreme Court in *Commissioner v. Duberstein*, 363 U.S. 278 (1960), has indicated a different view.

The *Merriam* case dealt with the then income tax provision (which was the predecessor of Section 102(a) 1954 Internal Revenue Code) which required a taxpayer to include in taxable income all income derived from compensation for personal services of whatever kind "but not the value of property acquired by gift, bequest, devise or descent," and held that a legacy in order to qualify as a bequest does not have to be gratuitous. *Merriam* followed the New York case of *Orton v. Orton*, 3 Keys (N.Y.) 486 and expressly pointed out that a legacy is a gift of chattels and is a "thing given either as a gratuity or a recompense". "Recompense" by every dictionary definition and as used in common parlance means among other things compensation, remuneration.

In *Merriam*, it had been argued by the government that in order for a "bequest" to qualify as such under the exemption statute, it must be bounty or gratuity and not a payment; that the term indicated that it was donative and not compensative; and that it was in that sense that the bequest was used in the 1913 Revenue Act. It was further argued that because of the position of the word "bequest" in the Act in relation to the words "gift" and "descent" that Congress had intended the word "bequest" to distinguish it from property passing for a consideration. All these arguments were overruled by the Supreme Court.

Therefore, should the definition of "bequest" as set forth in *Merriam* be considered changed by this Court's decision in *Duberstein* which dealt with "gifts"? Considering that Congress

did not see fit to make any change in the words of the Statute used since 1923, we submit that Congress in enacting the income tax laws since that time must have had in mind, and was satisfied with, the Supreme Court's interpretation in *Merriam* that a "bequest" was nonetheless a bequest for exemption purposes even though the motivation testatrix had in mind was that a service was or may be rendered therefor – but the Will does not expressly make this a condition. It is respectfully submitted that this Court should review the matter to resolve the conflict.

The Court of Appeals has decided a federal question in a way that is in conflict with the decision of this Court in *Lyeth v. Hoey*, 305 U.S. 188 (1938).

This Court in *Lyeth v. Hoey*, 305 U.S. 188 (1938) decided that it is necessary to determine in what capacity the beneficiary receives the distribution from the estate. Within the principle of the *Lyeth* case, Wolder received the stock and cash distributions from the estate *solely* by reason of his being a legatee under the Will. (See Surrogate DiFalco's decision, *infra*, page 37a, and Surrogate Silverman's opinion, *infra*, page 43a.)

The Court of Appeals below said that there are other cases holding that testamentary transfers to be taxable compensation for services as opposed to tax-free bequests citing namely *Cotnam v. Commissioner*, 263 F.2d 119 (5th Cir. 1959) and other cases, but as the Court below said, in each of those cases the testator did not fulfill his contractual obligation; the taxpayers litigated the merits of their claims against the estate, settlements were made. The taxpayers in those cases did not receive bequests under a will. In the case at bar, Wolder received his bequests solely as a legatee under Mrs. Boyce's Will. The Court of Appeals said that this is a distinction without a difference and declined to follow the difference.

We submit that there is a very substantial difference be-

tween the cases cited and the case at bar for there was no settlement ever made with petitioner. What petitioner received was a bequest, not a claim, not a debt, nor compensation. It was only by means of the bequest under the Will that he received the stock and cash. This was the very point in *Lyeth*. (Cf. *Bath v. United States* (CA 5 1973) —— F.2d ——, 73-2 USTC ¶ 9525.) Petitioner Wolder upheld the will provision. Moreover, since the provision decedent made in her Will for Wolder's benefit was different from the provision required by her agreement, decision in the Court of Appeals for the Second Circuit is in conflict with *Jacobs v. Commissioner,* 9 BTA 636 (1927) affirmed (CA 8) 34 F.2d 233 (1929) Cert. den. 280 U.S. 603, which held that where the beneficiary accepts the will provisions, then the beneficiary is deemed to have taken the bequest under the will, and not by way of any claim against the estate or under the prior agreement and that "all the logic in the world cannot change these facts," 34 F.2d 233, 235.

The Court of Appeals has decided a federal question in a way that is in conflict with applicable decisions of this Court with respect to basis and holding period.

Section 1014 of the 1954 Internal Revenue Code provides that the basis of property in the hands of a person acquiring the property from the decedent is the fair market value of the property at the date of the decedent's death (Sec. 1014(a), (b), (i); Reg. 1.1014-1(a), (b).

Regulation 1.1014-2, 3, 4 make it very clear that the uniformity of basis is important. It makes no difference when the distribution of stock owned by decedent at time of her death is actually made to the taxpayer by the Executors. For example, Regulation 1.1014-4(a)(ii) states that "Under the law governing Wills and the distribution of property of decedents, all titles to property acquired by bequest, devise or inheritance relate back to the date of the death of the decedent * * * . Accordingly,

there is a common acquisition date for all titles to property acquired from a decedent within the meaning of Section 1014 * * *. For example, if distribution of personal property left by a decedent is not made until one year after his death, the basis of such property in the hands of the legatee is the fair market value at the time when the decedent died, and not when the legatee actually received the property * * *." Specific bequests were always deemed to vest on the date of death, and date of death value was to be used as cost basis. This was clearly pointed out in *Brewster v. Gage*, 280 U.S. 327 (1930) and *Maguire v. Commissioner*, 313 U.S. 1 (1941). This Court has also held that the holding period runs from the date of decedent's death, *Helvering v. Gambrill*, 313 U.S. 11 (1941) and *McFeeley v. Commissioner*, 296 U.S. 102 (1936). While these cases dealt with the earlier Revenue Acts, the principles therein expressed were the same as in the existing Section 1014 of the Internal Revenue Code of 1954 and the regulations based thereon.

The Court of Appeals in the case at bar while recognizing that under New York law the petitioner received a specific bequest of the stock and under New York law title vested in him at decedent's death, nevertheless held that such law was "beside the point" and indicates that the value of the stock on the precise date when Wolder received the stock will determine the amount of his taxable income from compensation for services rendered, his basis, and inferentially the date he received the stock would be the date his holding period would begin. Considering the fact that the stock increased in value from some $46,945 on decedent's death to $63,937 by the time the stock was transferred into his name, the Court of Appeals is saying that the difference of some $13,000 is also to be taxed as ordinary income to him and not capital gain. We submit this is contrary to statutory law, to the prior decisions of this Court, and the decision below should be reviewed.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: April 23, 1974

APPENDIX

Decision of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

for the Second Circuit

Nos. 136, 373, 374—September Term, 1973.

(Argued December 19, 1973 Decided February 21, 1974.)

Docket Nos. 73-1507, 73-1847, 73-1848

Victor R. Wolder and Marjorie Wolder,

Appellants-Cross-Appellees,

v.

Commissioner of Internal Revenue,

Appellee-Cross-Appellant.

Estate of Marguerite K. Boyce, Victor R. Wolder and Manufacturers Hanover Trust Company, Executors,

Appellees,

v.

Commissioner of Internal Revenue,

Appellant.

Before:

Friendly, Mansfield and Oakes,

Circuit Judges.

Appeals and cross-appeals from judgments entered in the Tax Court holding that securities and cash received by appellant/cross-appellee Wolder were taxable income for the year 1965 in

Nos. 73-1507, -1847, and holding that these assets were deductible from the gross estate of the late Marguerite K. Boyce in No. 73-1848.

In the appeal of Victor R. and Marjorie Wolder, the decision of the Tax Court is affirmed; in the cross-appeal of the Commissioner, the decision of the Tax Court is reversed and the case remanded to that court for proceedings consistent with this opinion. The Tax Court's decision in No. 73-1848 is affirmed.

Victor R. Wolder, *Appellant-Cross-Appellee Pro Se.*

Jonathan S. Cohen, Tax Division, Department of Justice, Washington, D.C. (Scott P. Crampton, Assistant Attorney General of the United States; Meyer Rothwacks and Carleton D. Powell, Department of Justice, Washington, D.C., on the brief), *for Appellee-Cross-Appellant and Appellant Commissioner of Internal Revenue.*

Hewitt A. Conway, New York, N.Y. (John F. Rossi, of counsel), *for Appellees Estate of Marguerite K. Boyce, Victor R. Wolder and Manufacturers Hanover Trust Company.*

Oakes, *Circuit Judge:*

These two cases, involving an appeal and cross-appeal in the individual taxpayers' case and an appeal by the Commissioner in the estate taxpayer's case, essentially turn on one question: whether an attorney contracting to and performing lifetime legal services for a client receives income when the client, pursuant to

the contract, bequeaths a substantial sum to the attorney in lieu of the payment of fees during the client's lifetime. In the individual taxpayer's case, the Tax Court held that the fair market value of the stock and cash received under the client's will constituted taxable income under §61, Int. Rev. Code of 1954, and was not exempt from taxation as a bequest under §102 of the Code. From this ruling the individual taxpayers, Victor R. Wolder, the attorney, and his wife, who signed joint returns, appeal. The Tax Court also held that the stock and cash received were constructively received by the taxpayer in 1965, the year of the death of the client, Marguerite K. Boyce, rather than 1966, the year the individual taxpayers actually received the stock and cash. The stock, consisting of 750 shares of common stock in Schering Corp., increased substantially in value from the date of Mrs. Boyce's death on July 24, 1965, until January of 1966 when the stock certificates were actually received by the individual taxpayers. The Commissioner appeals this decision of the Tax Court, the statute of limitations having run on the tax year 1965.[1]

The estate case is conceded by all to hinge upon the ruling in the individual taxpayers' case, at least to the extent that, if the stock and cash which went to Attorney Wolder were taxable income to him, as the Tax Court found in his case, the estate is entitled to deduct the amount of the bequest to him as a debt of the decedent client.

The opinion of the Tax Court, by Judge Tannenwald, in the individual taxpayers' case is reported at 58 T.C. 974; the

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1. The Commissioner argues, *inter alia*, that the taxpayers are estopped from taking advantage of the statute by virtue of a letter, referring to receipt of the stock in 1966, requesting a favorable tax ruling on the main issue here presented.

opinion of the same Tax Court judge in the estate case is reported at P-H Memo T.C., ¶ 72,204.[2] Jurisdiction in this court is conferred by § 7482, Int. Rev. Code of 1954.

There is no basic disagreement as to the facts. On or about October 3, 1947, Victor R. Wolder, as attorney, and Marguerite K. Boyce, as client, entered into a written agreement which, after reciting Mr. Wolder's past services on her behalf in an action against her ex-husband for which he had made no charge, consisted of mutual promises, first on the part of Wolder to render to Mrs. Boyce "such legal services as she shall in her opinion personally require from time to time as long as both . . . shall live and not to bill her for such services," and second on the part of Mrs. Boyce to make a codicil to her last will and testament giving and bequeathing to Mr. Wolder or to his estate "my 500 shares of Class B common stock of White Laboratories, Inc." or "such other . . . securities" as might go to her in the event of a merger or consolidation of White Laboratories. Subsequently, in 1957, White Laboratories did merge into Schering Corp. and Mrs. Boyce received 750 shares of Schering common and 500 shares of Schering convertible preferred. In 1964 the convertible preferred was redeemed for $15,845. In a revised will dated April 23, 1965, Mrs. Boyce, true to the agreement with Mr. Wolder, bequeathed to him or his estate the sum of $15,845 and the 750 shares of common stock of Schering Corp. There is no dispute but that Victor R. Wolder had rendered legal services to Mrs. Boyce over her lifetime (though apparently these consisted largely of revising her will) and had not billed her therefor so

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2. Because we affirm the decision of the Tax Court below that the fair market value of the securities and the cash were taxable income to Wolder, we necessarily affirm the decision of the Tax Court in No. 73-1848 without reaching the question presented by the parties in that appeal. No further reference to the substance of that appeal will be made herein.

that he was entitled to performance by her under the agreement, on which she had had a measure of independent legal advice. At least the New York Surrogate's Court (DiFalco, *J.*) ultimately so found in contested proceedings in which Mrs. Boyce's residuary legatees contended that the will merely provided for payment of a debt and took the position that Wolder was not entitled to payment until he proved the debt in accordance with § 212, New York Surrogate's Court Act.[3] The Surrogate Court proceedings on the part of the residuary legatees were not instituted until the latter part of February, 1966, and the surrogate's decision thereon was not handed down until September, 1966.

Since in the Commissioner's cross-appeal the timing of receipt is important, it is to be noted that Wolder and Manufacturers Hanover Trust Co. (Manufacturers) were appointed coexecutors of the estate on September 17, 1965, and that at the time of Mrs. Boyce's death the Schering stock was held in a custodial account with Manufacturers and registered in the name of its nominee. By letter dated October 1, 1965, Wolder advised Manufacturers that he elected to receive the cash and stock bequest and "recommended" the distribution be made forthwith of all specific legacies, including his own. Manufacturers did not comply, and in December, 1965, he again requested them to distribute the Schering stock. The estate was highly liquid and there were ample funds to pay creditors, taxes and estimated expenses. It was not until January 13, 1966, however, that Manufacturers assigned the shares; it was not until January 21 that a transfer was made on the books of Schering Corp., and the stock certifi-

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3. Subsequently another surrogate held that the estate would not be obligated under the so-called tax clause in Mrs. Boyce's will to reimburse Mr. Wolder for any income tax payable by him by reason of the bequest made to him in accordance with the 1947 contract.

cates were physically delivered to Wolder on January 25, 1966, about a month before the residuary legatees raised their objections. It was not until November 22, 1966, after Surrogate DiFalco's decision favorable to Wolder became final, that he received the $15,845 representing the cash from the sale of the Schering convertible preferred that took place prior to Mrs. Boyce's death. The fair market value of the Schering stock at the date of her death was $46,945.31; on January 13, 1966, it was $63,937.50. The Commissioner had evaluated the stock at $68,625, representing its value on February 2, 1966; the selection of a February date was apparently in turn based upon a letter by Mr. Wolder requesting a ruling in which he stated that he received the stock in that month, but in which he plainly was mistaken.

Wolder argues that the legacy he received under Mrs. Boyce's will is specifically excluded from income by virtue of § 102(a), Int. Rev. Code of 1954, which provides that "Gross Income does not include the value of property acquired by gift, bequest, devise or inheritance . . . ." *See also* Treas. Reg. 1.102-1(a). The individual taxpayer, as did dissenting Judge Quealy below, relies upon *United States v. Merriam*, 263 U.S. 179 (1923), and its progeny for the proposition that the term "bequest" in § 102(a) has not been restricted so as to exclude bequests made on account of some consideration flowing from the beneficiary to the decedent. In *Merriam* the testator made cash bequests to certain persons who were named executors of the estate, and these bequests were " 'in lieu of all compensation or commissions to which they would otherwise be entitled as executors or trustees.' " 263 U.S. at 184. The Court held nevertheless that the legacies were exempt from taxation, drawing a distinction—which in a day and age when we look to substance and not to form strikes us as of doubtful utility—between cases where

"compensation [is] fixed by will for services to be rendered by the executor and [where] a legacy [is paid] to one upon the implied condition that he shall clothe himself with the character of executor." 263 U.S. at 187. In the former case, Mr. Justice Sutherland said, the executor "must perform the services to earn the compensation" while in the latter case "he need do no more than in good faith comply with the condition [that he be executor] in order to receive the bequest." The Court went on to take the view that the provision in the will that the bequest was in lieu of commissions was simply "an expression of the testator's will that the executor shall not receive statutory allowances for the services he may render." While the distinction drawn in the *Merriam* case hardly stands economic analysis, *Bank of New York v. Helvering*, 132 F.2d 773 (2d Cir. 1943), follows it on the basis that it is controlling law.[4]

But we think that *Merriam* is inapplicable to the facts of this case, for here there is no dispute but that the parties did contract for services and—while the services were limited in nature—there was also no question but that they were actually rendered. Thus the provisions of Mrs. Boyce's will, at least for federal tax purposes, went to satisfy her obligation under the contract. The contract in effect was one for the postponed payment of legal services, *i.e.*, by a legacy under the will for services rendered during the decedent's life.

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4. One also doubts the present day validity of the underlying philosophical premise of *Merriam*, that "If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer." 263 U.S. at 188. In *White v. United States*, 305 U.S. 281, 292 (1938), after noting for the majority that it was not "impressed" by this very argument, Mr. Justice Stone said, "It is the function and duty of courts to resolve doubts. We know of no reason why that function should be abdicated in a tax case more than in any other where the rights of suitors turn on the construction of a statute and it is our duty to decide what that construction fairly should be."

Moreover, the Supreme Court itself has taken an entirely different viewpoint from *Merriam* when it comes to in interpreting § 102(a), or its predecessor, § 22(b)(3), Int. Rev. Code of 1939, in reference to what are gifts. In *Commissioner v. Duberstein,* 363 U.S. 278 (1960), the Court held that the true test is whether in actuality the gift is a bona fide gift or simply a method for paying compensation. This question is resolved by an examination of the intent of the parties, the reasons for the transfer, and the parties' performance in accordance with their intentions–"what the basic reason for [the donor's] conduct was in fact–the dominant reason that explains his action in making the transfer." 363 U.S. at 286. *See also Carrigan v. Commissioner,* 197 F.2d 246 (2d Cir. 1952); *Fisher v. Commissioner,* 59 F.2d 192 (2d Cir. 1932). There are other cases holding testamentary transfers to be taxable compensation for services as opposed to tax-free bequests. *Cotnam v. Commissioner,* 263 F.2d 119 (5th Cir. 1959); *Mariani v. Commissioner,* 54 T.C. 135 (1970); *Cohen v. United States,* 241 F. Supp. 740 (E.D. Mich. 1965); *Davies v. Commissioner,* 23 T.C. 524 (1954). True, in each of these cases the testator did not fulfill his contractual obligation to provide in his will for payment of services rendered by the taxpayer, forcing the taxpayers to litigate the merits of their claims against the estates, whereas in the case at bar the terms of the contract were carried out. This is a distinction without a difference, and while we could decline to follow them in the case at bar, we see no reason to do so.

Indeed, it is to be recollected that § 102 is, after all, an exception to the basic provision in § 61(a) that "Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including . . . (1) Compensation for services, including fees, commissions and similar items . . . ." The congressional purpose is to tax income comprehensively.

Commissioner v. Jacobson, 336 U.S. 28, 49 (1949). A transfer in the form of a bequest was the method that the parties chose to compensate Mr. Wolder for his legal services, and that transfer is therefore subject to taxation, whatever its label whether by federal or by local law may be. *See also Hort v. Commissioner,* 313 U.S. 28, 31 (1941).

Taxpayer's argument that he received the stock and cash as a "bequest" under New York law and the decisions of the surrogates is thus beside the point. New York law does, of course, control as to the extent of the taxpayer's legal rights to the property in question, but it does not control as to the characterization of the property for federal income tax purposes. *United States v. Mitchell,* 403 U.S. 190, 197 (1971); *Commissioner v. Duberstein,* 363 U.S. at 285; *Morgan v. Commissioner,* 309 U.S. 78, 80-81 (1940); *Higt v. United States,* 256 F.2d 795, 800 (2d Cir. 1958). New York law cannot be decisive on the question whether any given transfer is income under §61(a) or is exempt under §102(a) of the Code. We repeat, we see no difference between the transfer here made in the form of a bequest and the transfer under *Commissioner v. Duberstein, supra,* which was made without consideration, with no legal or moral obligation, and which was indeed a "common-law gift," but which was nevertheless held not to be a gift excludable under §102(a).

On the Commissioner's cross-appeal, there is no doubt that an item of gross income is generally included in the taxable year in which it is actually received, absent some method of accounting other than the cash method which Wolder used here. §451 (a), Int. Rev. Code of 1954. To tax income in a year other than in which it is actually received by a cash-basis taxpayer, it must be constructively received. Treas. Reg. §1.451-1(a). We agree with the Commissioner that the Tax Court was in error in holding

that Wolder "had the right and power to compel delivery" of the stock and cash during 1965. Wolder did in fact ask for the stock on two occasions in 1965, but that request was unsuccessful; he did not receive the stock until early 1966 and the cash until much later. The key inquiry, of course, is whether or not in fact he had the stock readily available to him in 1965, that is, subject to his "unfettered command." *Corliss v. Bowers*, 281 U.S. 376, 378 (1930). He certainly was not in a position as one of two coexecutors, lacking possession of the securities which were in fact held by his coexecutor in a custodian account, to have them delivered to himself merely by his own say-so. Indeed he could not in fact achieve this result. Certainly it was open to the residuary legatees, as they subsequently did in February, 1966, to object to the distribution of the legacy. There is every reason to believe that his coexecutor may have been acting with some caution in not agreeing to make delivery until it did so in 1966. In any event, while there apparently were sufficient assets to satisfy the claims of creditors, there were reasons justifying the coexecutor's retention of the stock, without abusing its discretion. *Cf. Hyland v. Commissioner*, 175 F.2d 422, 423-24 (2d Cir. 1949). Under the regulations, which control the application of the doctrine in all instances, "income is not constructively received if the taxpayer's control of its receipt is subject to substantial limitations or restrictions." *See* Treas. Reg. §1.451-2(a). Until such time as the consent of the coexecutor was obtained to the transfer, and there is no indication whatsoever that such consent was obtained until January, 1966, the individual taxpayer was subject to "substantial limitations or restrictions." It is true, of course, that, since *Ross v. Commissioner*, 169 F.2d 483 (1st Cir. 1948), the doctrine of constructive receipt has been available to taxpayers as well as to the Commissioner. *See generally* 2 Mertens, Law of Federal Income Taxation §10.02. But here the basic test of constructive

receipt was not met: the income was not "unqualifiedly subject to the demand" of the cash basis taxpayer, to use Justice Frankfurter's phrase in *Ross,* 169 F.2d at 490. The date of the transfer of the stock to Wolder was, we hold the date of his actual receipt of the certificates themselves, on or before January 25, 1966.[5]

The court having reached this result, Wolder argues that he is entitled to compute his tax liability for 1966 under the income averaging provisions of §232(g)(2) of the Revenue Act of 1964, 78 Stat. 19, and §1301 of the Code. This argument must fail because it is clear that Wolder was not employed by Mrs. Boyce to effect a *particular* result as required under §1301(b) as it read prior to 1964. The definition published by the Commissioner under Treas. Reg. §1.1301-2b(1)(iii), and the examples under 1.1301-2(b)(2), (1) & (2) (1962), make it evident that arrangements to render general legal services do not qualify for treatment under §1301, Int. Rev. Code of 1954.

On the appeal by the Commissioner from the judgment of the Tax Court permitting the estate to deduct as a debt the sum of $15,845 in cash and $46,945.31 representing the value at the date of death of the Schering stock, the Commissioner has conceded that the estate must prevail, the deduction being properly taken under §2053(a), Int. Rev. Code of 1954. *See* note 2 *supra.*

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5. On remand, the Tax Court will have to determine the precise date on which Wolder received the stock in order to establish Wolder's exact receipt of income from (and, incidentally, correct basis in) the stock, which is its fair market value on the day of delivery of the certificates to him, there being no evidence that Wolder received duly endorsed certificates and/or stock powers prior to delivery to the transfer agent. While this question is governed by New York law, *cf. Ginsberg v. Commissioner,* 305 F.2d 664, 668 (2d Cir. 1962); *see also In re Ruszkowski's Estate,* 45 Misc. 2d 380, 256 N.Y.S.2d 983 (Surr. Ct. 1965); New York Uniform Commercial Code §8-309, the exact facts do not appear of record herein.

Decision of the United States Court of Appeals for the Second Circuit

Judgment in the appeal of Victor R. Wolder and Marjorie Wolder affirmed; judgment in the cross-appeal of the Commissioner reversed and remanded for proceedings consistent with this opinion; judgment in the case of *Estate of Boyce et al. v. Commissioner* affirmed.

Order of the Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of March, one thousand nine hundred and seventy-four.

Present:

HON. HENRY J. FRIENDLY,
HON. WALTER R. MANSFIELD,
HON. JAMES L. OAKES,
Circuit Judges.

73-1507, 73-1847

Victor R. Wolder and Marjorie Wolder,
Petitioners-Appellants,

v.

Commissioner of Internal Revenue,
Respondent-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellants, Victor R. and Marjorie Wolder,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO
Clerk

Opinion of Tax Court in
Victor R. Wolder and Marjorie Wolder, Petitioners

(Filed September 21, 1972)

58 T. C. No. 94

UNITED STATES TAX COURT

Victor R. Wolder and Marjorie Wolder,
Petitioners,

v.

Commissioner of Internal Revenue,
Respondent.

Docket No. 297-70. Filed September 21, 1972.

Petitioner and decedent, during decedent's lifetime, entered into an agreement whereby petitioner undertook to perform legal services for decedent without charge and decedent undertook to leave him certain assets in her will. The services were rendered and the agreed provision was contained in decedent's last will. *Held,* petitioner received the benefits under the will as compensation for services, taxable under section 61, and not as a bequest, excludable from gross income under section 102(a), I.R.C. 1954. *Held further,* petitioner constructively received specific shares of stock from decedent on the date of death and not on the date the certificates were physically received by him. *Held further,* petitioner is not entitled to the benefits of income-averaging under section 1301, et seq., I.R.C. 1954.

Victor R. Wolder and *Sol R. Dunkin,* for the petitioners.

Michael A. Menillo, for the respondent.

Opinion of Tax Court in
Victor R. Wolder and Marjorie Wolder, Petitioners

TANNENWALD, *Judge:* Respondent determined a deficiency of $23,347.74 in petitioners' income tax for 1966. The issues presented involve the proper treatment for income tax purposes of certain securities and cash received by petitioner Victor R. Wolder from the estate of Marguerite K. Boyce, particularly whether the value thereof is excludable from gross income under section 102(a).[1]

Findings of Fact

Some of the facts have been stipulated. The stipulation of facts, together with the exhibits attached thereto, is incorporated herein by this reference.

Victor R. Wolder (hereinafter referred to as petitioner) and Marjorie Wolder are husband and wife and resided in Port Chester, New York, at the time the petition herein was filed. They filed a joint Federal income tax return on a cash basis for 1966 with the district director of internal revenue, Manhattan, New York. Marjorie Wolder is a party to this proceeding only as a result of filing said joint return with petitioner.

On or about October 3, 1947, petitioner and Marguerite K. Boyce (hereinafter referred to as Marguerite) entered into a written agreement, whereby petitioner agreed to render to Marguerite

> such legal services as she shall in her opinion personally require from time to time as long as both [Marguerite] and [petitioner] shall live and not to bill her for such services.

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1. All references are to the Internal Revenue Code of 1954, as amended.

In consideration therefor, Marguerite agreed that she would bequeath to petitioner or his estate 500 shares of Class B common stock of White Laboratories, Inc. (which she then owned) and any additional shares, securities, rights, or stock dividends that she might acquire in the future by virtue of her ownership thereof.

From October 3, 1947 until Marguerite's death on July 24, 1965, petitioner rendered all legal services requested by Marguerite, including the preparation of her final will, without charge.

On September 19, 1957, White Laboratories, Inc., was merged into Schering Corporation and Marguerite received 750 shares of Schering common stock and 500 shares of Schering convertible preferred stock in exchange for her 500 shares in White Laboratories, Inc. The preferred stock was redeemed in 1964 for $15,845. A provision for petitioner's benefit reflecting the 1947 agreement, was included in each will or codicil executed by Marguerite after October 3, 1947, altered only to reflect the changes that occurred in her original interest in White Laboratories, Inc.

Marguerite died on July 24, 1965. Her last will and testament, executed on April 23, 1965, was admitted to probate on September 15, 1965. Petitioner and Manufacturers Hanover Trust Co. (Manufacturers) were appointed executors of Marguerite's estate on September 17, 1965. Marguerite's will provided, in pertinent part, as follows:

> FIFTH: Whereas, heretofore I made a bequest to VICTOR R. WOLDER or to his estate if he predeceases me, certain shares of preferred stock and certain shares of common stock of Schering Corporation, and whereas I have heretofore disposed of the preferred stock and now own

the common stock, now, therefore, I make the following provisions for his benefit and that of his estate if he predeceases me:

(a) I give and bequeath to VICTOR R. WOLDER, or, if he predeceases me, to his estate (or to such person or persons as he may appoint by his Last Will and Testament) the sum of Fifteen Thousand Eight Hundred Forty-Five ($15,845.00) Dollars.

(b) Further, I am now the owner of seven hundred fifty (750) shares of ($1.00 par value) common stock of Schering Corporation. It is my intention to give and bequeath to said VICTOR R. WOLDER, or his estate, if he predeceases me, said Schering Corporation stock which I now own and any stock or proceeds from its disposition which I may hereafter receive resulting therefrom. Therefore, I give and bequeath to said VICTOR R. WOLDER or to his estate if he shall predecease me (or to such person or persons as he may appoint by his Last Will and Testament) (a) seven hundred fifty (750) shares of common stock ($1.00 par value) of Schering Corporation, which stock I now own, and (b) if the said Schering Corp. shall hereafter issue stock dividends, warrants or rights or shall be refinanced, recapitalized, reorganized, merged or consolidated, or if any stock I at any time own in said corporation shall be split or if any such stock be exchanged for any other stock, or if I shall exercise any warrants or rights or my conversion rights under the preferred stock, such other or additional shares or securities or rights as I shall at any time hereafter own or acquire or be entitled to by virtue of my ownership of the aforementioned shares in the Schering Corporation; and (c) if any or all of said stock, securities, warrants or rights which I now own or hereafter acquire

are disposed of during my life, then, with respect to the stock, securities, warrants and rights disposed of, an amount equivalent to the worth of such stock or securities, warrants or rights so disposed of, determined at the greater of their worth at the date or dates of their disposition or the greater of the worth of the original shares included in certain White Laboratories, Inc. Class "B" stock owned by me on October 3, 1947, before it was merged with Schering Corporation.

By letter dated October 1, 1965, petitioner advised his corporate co-executor as follows:

> First, so as to, for all time, fix my rights I declare and I hereby elect to receive the legacy and bequest of $15,845.00 and the 750 shares of $1.00 par value common stock of Schering Corporation which was given to me by decedent under Paragraph FIFTH of her last Will.

In that letter, petitioner recommended that distribution be made forthwith of all specific legacies provided for in Marguerite's will.

At the time of Marguerite's death, the 750 shares of Schering Corporation common stock belonging to her were held in a custodial account with Manufacturers and were registered in the name of its nominee. Formal assignment of the shares occurred on January 13, 1966. The stock certificates were re-registered in petitioner's individual name on January 21, 1966 and received by petitioner on or before January 25, 1966.

Petitioner also received an amount equal to the dividends on the Schering stock totalling $675 declared and paid to Schering shareholders after Marguerite's death and during 1965.

Neither the shares of Schering stock nor the foregoing amount representing dividends thereon were included in the accounting filed by the executors.

In the latter part of February 1966, petitioner and Manufacturers were advised that the residuary legatees of Marguerite's will objected to the distribution of petitioner's cash legacy and also demanded the return of the Schering Corporation stock (and the dividends thereon) to the estate, to be held by it until such time as petitioner established his claim thereto against the estate. In the ensuing litigation in the Surrogate's Court, New York County, the residuary legatees contended that the provisions in Marguerite's will merely provided for payment of a debt owed petitioner by Marguerite and that he was not entitled to payment unless he proved his claim in accordance with section 212 of the Surrogate's Court Act of New York.

On or about September 13, 1966, The Honorable S. Samuel DiFalco, Surrogate, New York County, issued a decision which held that, by virtue of the provision in the will, "the testatrix fully and completely performed the promise, which she had made in the contract" and, in view of petitioner's unconditional acceptance of "the legacy," petitioner was not required to prove his claim in order to receive the benefits thereof. The Surrogate went on to say that the residuary legatees might object to the final accounting of the executors in the event that petitioner had, in fact, breached his contract with Marguerite and the indebtedness representing such damages, if any, were not reflected in that accounting.

In a subsequent proceeding, dealing mainly with an issue not relevant herein, The Honorable Samuel J. Silverman, Surrogate, New York County, held that petitioner was "entitled to the benefits of the bequest under Article Fifth of the will."

Opinion of Tax Court in
Victor R. Wolder and Marjorie Wolder, Petitioners

On November 22, 1966, pursuant to an order of the Surrogate's Court, New York County, dated September 28, 1966, petitioner received $15,845 from Marguerite's estate, this amount representing the balance of his legacy under Article FIFTH of Marguerite's will.

The assets of the estate, consisting almost entirely of cash, life insurance, and marketable securities, had a date-of-death value of $606,836.37 and the estimated debts, taxes, and administration expenses amounted to $111,312.39.[2]

The fair market value of the Schering stock at the time of Marguerite's death was $46,945.31, its value as of January 13, 1966 was $63,937.50, and its value on February 2, 1966 was $68,625.00.

Petitioner sold the Schering stock he received from the estate as follows:

Number of Shares	Trade Date	Settlement Date	Amount	Net Amount
50	1-25-66	1-31-66	$ 4,625.00	$ 4,582.77
100	1-25-66	1-31-66	9,275.00	9,222.53
100	2-2-66	2-8-66	9,125.00	9,072.68
100	2-7-66	2-11-66	8,950.00	8,897.87
100	3-3-66	3-9-66	8,637.50	8,585.68
100	3-3-66	3-9-66	8,650.00	8,598.17
200	3-11-66	3-17-66	16,700.00	16,596.96
				$65,556.66

As a result of these sales, petitioner reported a long-term capital gain of $18,611.35 on his 1966 income tax return, this

2. The final accounting showed debts, taxes, and administration expenses paid of $104,847.70 less credits of $1,515.56.

being the difference between the fair market value of the stock as of the date of Marguerite's death and the amount received on account of the sale thereof. The petitioner reported no income in 1966 on account of the receipt of any of the benefits from Marguerite.

In his notice of deficiency, respondent determined that the 750 shares of common stock of Schering Corporation constituted taxable income to the petitioner in an amount equivalent to its fair market value as of February 2, 1966 (the date respondent alleges that petitioner received the stock), amounting to $68,625. Respondent further determined that the cash distribution of $15,845 also received by petitioner under the will constituted additional income taxable to petitioner in 1966. Offsetting adjustments were made regarding the petitioner's sale of the Schering stock in 1966.

Opinion

The initial issue for decision is whether the cash and Schering stock received by petitioner under Article FIFTH of Marguerite's will constituted compensation for services, taxable under section 61, or a bequest, excludable from gross income under section 102(a).[3] Petitioner contends that these items fall in the latter category. His reasoning is that (1) the Surrogate correctly held that he was a legatee and not a creditor and (2), such being the case, the provisions for his benefit constitute a "bequest" for Federal income tax purposes. Respondent contends that the provisions of Article FIFTH represent simply a

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3. SEC. 102. GIFTS AND INHERITANCES.

(a) General Rule.—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance.

method chosen by Marguerite to compensate petitioner for his services in accordance with her agreement with him and that the cash and stock which petitioner received should accordingly be taxed. For the reasons hereinafter set forth, we agree with respondent.

We find it unnecessary to decide, at least for the purposes of this initial issue, whether the Surrogates' decisions that the provisions of Article FIFTH constituted a "bequest" correctly apply the applicable New York law. Cf. *Commissioner v. Estate of Bosch*, 387 U.S. 456 (1967). New York law can do no more than define the legal interests and rights of petitioner vis-a-vis Marguerite's estate; it cannot ascribe to those interests and rights a characterization which is binding for purposes of determining what is or is not taxable. *United States v. Mitchell*, 403 U.S. 190, 197 (1971); *Morgan v. Commissioner*, 309 U.S. 78, 80-81 (1940); *Hight v. United States*, 256 F.2d 795, 800 (C.A. 2, 1958); *Estate of Anna Hart Kinney*, 39 T.C. 728, 731 (1963). The test of taxability depends upon what the item in question actually represents. *Hort v. Commissioner*, 313 U.S. 28 (1941); *Cotnam v. Commissioner*, 263 F.2d 119 (C.A. 5, 1959), affirming on this issue 28 T.C. 947 (1957).

There is no question but that, under the 1947 agreement, petitioner undertook to render services to Marguerite without charge and that she, in turn, undertook to pay for them by way of a specific provision in her will. Similarly, there is no question that these undertakings were implemented. The intentions of the parties and their performance in accordance with those intentions is clear and, in our opinion, the critical factor. *Rose v. Grant*, 39 F.2d 338, 340 (C.A. 5, 1930); *Mildred E. McDonald*, 2 T.C. 840, 849 (1943).[4]

4. See also *Lee S. Jones*, T.C. Memo. 1964-39.

The absence of any conditional language in the provisions of Article FIFTH is not determinative. It is simply one element to be taken into account along with the correlative element that petitioner prepared the document. We have no reason, on the basis of the record herein, to conclude that Marguerite was aware of the technical nature of the provision. Indeed, it seems more than likely that if her intention had been to bestow the cash and Schering stock on petitioner without regard to the 1947 agreement, the will would have specifically so stated.

With reference to the Surrogates' decisions, we recognize that, although they are not controlling, they nevertheless are a further element which should properly be taken into account. Nevertheless, we do not find enough in these decisions to cause us to conclude that petitioner should prevail. Surrogate DiFalco merely held that petitioner did not have to prove his claim as a creditor. He was neither asked to decide, nor did he decide, that the provisions of Article FIFTH were not compensation or that petitioner would have been entitled to receive the benefits thereunder even if he had *not* performed his obligations under the 1947 agreement. Cf. *Hight v. United States, supra,* 256 F.2d at 801. In point of fact, Surrogate DiFalco referred to the possibility of an objection being raised in the final accounting in the event that it could be shown that petitioner had breached the agreement.

Petitioner's reliance on *United States v. Merriam,* 263 U.S. 179 (1923), and its progeny is misplaced. The issue in that case, and in those that followed it, was whether provisions for benefits to executors required the actual performance of services or merely initial qualification in that capacity; where the taxpayer was successful it was because the court found that no services were required. See, e.g., *Bank of New York v. Helvering,* 132

F.2d 773 (C.A. 2, 1943), reversing a Memorandum Opinion of this Court. Petitioner's attempt to distinguish cases such as *Cotnam v. Commissioner, supra,* similarly misses the mark. His thesis is that those cases involve payments made by an estate because a testator failed to provide the promised compensation in his will, while here the promise was carried out. In a nutshell, petitioner would have us hold that breach produces taxability but observance does not. Petitioner's argument would have us transpose a well-known adage to read "honored more in the observance than in the breach." This we refuse to do. Cf. *Beecher v. United States,* 280 F.2d 202, 204 (C.A. 3, 1960).

The long and the short of it is that petitioner and Marguerite made a bargain and the bargain was kept. Petitioner was to be paid for his services by way of Marguerite's will and this is precisely what happened.[5] Irrespective of its characterization under state law, what petitioner received was compensation for services and taxable as such under section 61.

We now turn to the further question of the year or years in which petitioner received the compensation. As to the $15,845 in cash, the parties agree that, if it is taxable to petitioner, it is income to him in 1966. The dispute centers on the year in which the Schering stock was so received and the date as of which its value should be determined.[6]

Petitioner contends that, under New York law, his right to the stock was established as of the date of decedent's death and the doctrine of constructive receipt should be applied, thus

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5. We find petitioner's finely drawn distinctions between what he was promised and what he in fact received totally unpersuasive.

6. See *Mildred E. McDonald,* 2 T.C. 840, 853 (1943), where we did not reach this question.

eliminating the value of the stock from income in 1966. Alternatively, he suggests the applicability of section 1014(b)(1),[7] the consequences thereof being the same as those of his first contention.

Respondent has taken the position that a "bequest," as that term is used in section 1014(b)(1), must necessarily mean the same as the "bequest" referred to in section 102(a); therefore, our finding that petitioner was not the recipient of a tax-free bequest under section 102(a) should *a fortiori* preclude the applicability of section 1014. Thus, he argues that the time of receipt and holding period in regard to the stock are governed by the normal rules of accounting applicable to cash-basis taxpayers, to wit, the date of receipt.

We find it unnecessary to delve into the difficult question whether the term "bequest" can or should be given a different meaning for purposes of determining basis under section 1014 (b)(1). Compare *Helvering v. Stockholms Enskilda Bank,* 293 U.S. 84 (1934); *Rohmer v. Commissioner,* 153 F.2d 61, 65 (C.A. 2, 1946); *Estate of Robert J. Cuddihy,* 32 T.C. 1171, 1176 (1959). In our opinion, the doctrine of constructive receipt is properly applicable and consequently petitioner should be deemed to have received the Schering stock in 1965, a year not before us.[8]

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7. SEC. 1014. BASIS OF PROPERTY ACQUIRED FROM A DECEDENT.

* * * * * * * * *

(b) Property Acquired from the Decedent.—For purposes of subsection (a), the following property shall be considered to have been acquired from or to have passed from the decedent:

(1) Property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent;

8. We express no opinion as to what, if any, remedy respondent may have under sections 1311 through 1314. See also section 6501(e)(1)(A).

Opinion of Tax Court in
Victor R. Wolder and Marjorie Wolder, Petitioners

At the outset, we note that we are not dealing with a cash bequest, in which event the respondent's position that the normal rules applicable to cash-basis taxpayers apply would clearly have merit. We are dealing with a provision of a will disposing of specific shares of stock owned by Marguerite at her death.

Under New York law, petitioner is considered to be a specific legatee of the Schering stock and his rights thereto are determined accordingly. *In re Elliott's Estate,* 76 N.Y.S. 2d 755 (Surr. Ct., N.Y. Co., 1947); *In re Moorhead's Estate,* 65 N.Y.S. 2d 240 (Surr. Ct., N.Y. Co., 1940); *Matter of Strasenburgh,* 136 Misc. 91, 242 N.Y.S. 453 (Surr. Ct., Monroe Co., 1928). Title to the stock vested in petitioner as of the date of decedent's death and all dividends declared thereafter belonged to him. *Matter of Security Trust of Rochester,* 221 N.Y. 213, 116 N.E. 1006 (1917); *Matter of Utica Trust & Deposit Co.,* 148 App. Div. 525, 133 N.Y.S. 145 (3rd Dept. 1911). Cf. *Alfred Harrell, Executor,* 20 B.T.A. 103 (1930). He had the right and power to compel delivery of the Schering stock to himself. N.Y. Surrogate's Court Act, section 218;[9] *Matter of Roth,* 53 Misc. 2d 1066, 281 N.Y.S. 2d 225 (Surr. Ct., N.Y. Co., 1967); *Matter of Schwartz,* 2 Misc. 2d 542, 149 N.Y.S. 2d 638 (Surr. Ct., Kings Co., 1956). Given the liquidity of the estate, the executors could not have been surcharged for making such delivery prior to the expiration of the period for filing of claims against the estate. *Matter of Hostin,* 33 Misc. 2d 206, 207-208, 223 N.Y.S. 2d 893, 894 (Surr. Ct., West. Co. 1961). Indeed, the failure of the executors to consent to such a transfer would have been deemed unreasonable, arbitrary, and capricious. *Matter of Schwartz, supra.* Nor did the executors have any responsibility

9. This section has been replaced by N.Y. Estates, Powers and Trusts Law (McKinney's), sec. 11-1.5, effective September 1, 1967.

to take possession of the Schering stock in view of the fact that they clearly were not needed to satisfy claims against the estate or expenses of administration. *Matter of Columbia Trust Co.*, 186 App. Div. 377, 174 N.Y.S. 576 (1st Dept., 1919). Finally, they could not (and, in fact, did not in this case) receive commissions with respect thereto. N.Y. Surrogate's Court Act, section 285; *In re Pearsons' Will*, 182 N.Y.S. 2d 129, 131 (Surr. Ct. West. Co., 1958); see *Estate of Abraham Werbelovsky*, 11 T.C. 525, 529-530 (1948).

It is well established that income which is subject to a taxpayer's unfettered command and which he is free to enjoy at his own option is taxed to him as income, whether he chooses to enjoy it or not. *Corliss v. Bowers*, 281 U.S. 376 (1930); *Oliver G. Willits*, 50 T.C. 602, 612 (1968); see *Ralph E. Wilson*, 40 T.C. 543 (1963). Section 1.451-2(a), Income Tax Regulations, adds that the doctrine will not be applied where the taxpayer's control over the income is subject to substantial restrictions. Whether the taxpayer has the necessary control over the income is a question of fact. *Avery v. Commissioner*, 292 U.S. 210 (1934); *Oliver G. Willits, supra*, 50 T.C. at 613; *Basil F. Basila*, 36 T.C. 111, 116 (1961).

The applicability of this doctrine in this case hinges upon whether the restrictions imposed on petitioner's control over the stock were substantial. In the instant case, it appears that the assets of Marguerite's estate were far in excess of the liabilities. There is no reason in this record why petitioner could not have obtained immediate possession of the securities. He only had to demand their delivery.[10] The only restriction (if it can be called that) was that he would have to return the stock (or its equiva-

10. In his letter of October 1, 1965, petitioner recommended the immediate delivery of the Schering stock to him.

lent) if it were necessary to use it to pay any debts of the estate. This was, at best, a condition subsequent (see *Matter of Casper*, 161 Misc. 461, 463, 292 N.Y.S. 415, 418-419 (Surr. Ct. West. Co., 1936)) and, under the circumstances, a very remote one, to say the least. In short, petitioner must be deemed to have received the Schering stock on July 24, 1965; his basis is its fair market value at that time, and his holding period for determining his gain on the subsequent sale thereof must also start on that date.

Petitioner's final argument concerns the applicability of section 1301. Under section 232(g)(2) of Pub. L. 88-272, petitioner seeks to invoke the provision of section 1301 prior to its amendment in the Revenue Act of 1964. One of the requirements of section 1301(a)(3) as it then read was that the taxpayer receive not less than 80 percent of the income attributable to the services performed over the spread-back years in one taxable year. In the instant case, he received a little over 73 percent of the total compensation received in 1965 and a little less than 27 percent in 1966; clearly, income averaging is not available to petitioner.

To reflect our findings herein,

Decision will be entered under Rule 50.

Reviewed by the Court.

Opinion of Tax Court in
Victor R. Wolder and Marjorie Wolder, Petitioners

QUEALY, *Judge.*, dissenting: Section 102(a) exempts from tax, property acquired by bequest. It cannot be disputed that under New York law the securities and cash which the majority would tax as income to the petitioner were acquired by the petitioner by bequest pursuant to the will of Marguerite K. Boyce. The Surrogate's Court so held when the residuary legatee sought to compel the petitioner to qualify as a claimant against the estate.

The bequest was made in fulfillment of an agreement whereby petitioner was to render to the decedent such legal services as the decedent might require during her lifetime. It was, nevertheless, the voluntary act of the decedent. The petitioner's right to the bequest was not conditioned upon his ever having performed any services for the decedent, and there is no evidence that the decedent ever required any services other than the periodic updating of her will.

In the classical will, bequests were made to persons who had served the testator "in consideration of long and faithful service." The courts have never looked behind the will to determine the consideration for such a bequest. As the law has been interpreted for these many years, the term "bequest" in section 102(a) has not been restricted so as to exclude bequests made on account of some consideration flowing from the beneficiary to the decedent.

In *United States v. Merriam*, 263 U.S. 179 (1923), the Supreme Court held that a bequest need not be gratuitous in order to be exempt from income tax. See also, *Bank of New York v. Helvering*, 132 F.2d 733 (C.A. 2, 1943).

Following the *Merriam* decision, the courts have been called upon from time to time to decide whether an amount

received in satisfaction of the breach of an agreement on the part of the decedent to make a bequest might nevertheless be treated in the same manner as if the bequest had been made by the decedent. *Cotnam v. Commissioner*, 263 F.2d 119 (C.A. 5, 1959), affirming 28 T.C. 947 (1957); *Joseph M. Mariani*, 54 T.C. 135 (1970); *John Davies*, 23 T.C. 524 (1954); *Mildred E. McDonald*, 2 T.C. 840 (1943); *Cole L. Blease*, 16 B.T.A. 972 (1929); *Cohen v. United States*, 241 F. Supp. 740 (E.D. Mich. 1965). The question presented for decision in those cases was whether what was received by the claimant should be exempt from tax on the assumption that if the decedent had in fact bequeathed property to the claimant, as the decedent had agreed to do, it would have been exempt from tax. That question, in turn, depended upon whether the taxpayer took as a claimant against the estate or as a legatee. If there is no distinction, as the majority has held in this case, there would have been nothing to decide in the cited cases.

There is no precedent for the position of the majority of the Court. On the contrary, although section 102(a) or its counterpart has been a part of the tax laws from the inception of the income tax, the majority can point to no opinion in which a bequest was held to be taxable.

In this case, the Surrogate's Court in an adversary proceeding decided that the petitioner was entitled to the stock and cash bequeathed to him by the decedent as legatee. In substance, the Surrogate held that the decedent had provided in her will for an unconditional bequest of cash and stock to the petitioner, albeit such request may have been pursuant to a prior agreement between the decedent and the petitioner. However, since the bequest was unconditional, it was not incumbent upon the petitioner to prove his claim.

Opinion of Tax Court in
Victor R. Wolder and Marjorie Wolder, Petitioners

Once we accept the fact that the petitioner received the property by bequest, section 102(a) applies. It is not a matter of looking behind the bequest, in order to ascertain the testatrix's motives, to prevent tax-avoidance. As a practical matter, if we look to the corollary effect upon the tax liability of the *Estate of Marguerite K. Boyce*, also decided this day, the decision of the majority results in a loss of revenue. What is involved is whether, at this late date, the courts should look behind the will of a decedent to ascertain whether a specific bequest was supported by some consideration. Regardless of consideration, a bequest by will is a voluntary act, not subject to contract. I find no reason for disregarding the literal application of the statute exempting such bequests from tax.

Opinion of Tax Court in related case involving the Estate of Marguerite K. Boyce

TC Memo 1972-204. Estate of Marguerite K. Boyce, Victor R. Wolder and Manufacturers Hanover Trust Company. Docket No. 367-70. 9-21-72. Opinion by Tannenwald, *J.* Date of death, July 24, 1965. Deficiencies redetermined.

.1. Value of stock bequeathed to co-executor in consideration for his legal services to decedent during her life was deductible from gross estate. The bequest was compensation for services.

Official Report

Hewitt A. Conway, Richard J. Concannon, and John F. Rossi, for the petitioners.

Michael A. Menillo, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

Tannenwald, *Judge:* Respondent determined a deficiency of $32,137.86 in the estate tax of the estate of Marguerite K. Boyce. Certain concessions having been made, the sole question remaining for decision is whether cash and securities paid to decedent's attorney under a provision in the decedent's will can be deducted from her gross estate under section 2053(a)[1] as payment of a claim for services rendered to her by petitioner during her lifetime.

All of the facts have been stipulated and are found accordingly.

Marguerite K. Boyce (hereinafter referred to as the decedent) died testate, a resident of New York, on July 24, 1965. The petitioners herein, Victor R. Wolder (hereinafter referred to

as Wolder), a resident of New York at the time the petition herein was filed, and Manufacturers Hanover Trust Company (hereinafter referred to as Manufacturers), whose principal place of business at that time was also located in New York, duly qualified as executors under the will. An estate tax return was timely filed with the district director of internal revenue in New York City.

On or about October 3, 1947, the decedent and Wolder, an attorney, entered into a written agreement whereby Wolder agreed to render to the decedent

> such legal services as she shall in her opinion personally require from time to time as long as both [the decedent] and Mr. Wolder shall live and not to bill her for such services.

The decedent, in consideration therefor, covenanted that she would bequeath to Wolder or his estate 500 shares of Class B common stock of White Laboratories, Inc. (which she then owned), and any additional shares, securities, rights, or stock dividends that she might acquire in the future by virtue of her ownership thereof.

From October 3, 1947 until decedent's death, Wolder rendered all legal services requested by decedent, including the preparation of a number of wills and codicils, without charge.

On September 19, 1957, White Laboratories, Inc., was merged into Schering Corporation and the decedent received 750 shares of Schering common stock and 500 shares of Schering convertible preferred stock in exchange for her 500 shares of White Laboratories, Inc. The preferred stock was later redeemed for $15,845.

Opinion of Tax Court in related case involving the Estate of Marguerite K. Boyce

In each will or codicil executed by the decedent after October 3, 1947, the provision for Wolder's benefit was continued, altered only to reflect the changes that occurred in her original interest in White Laboratories, Inc.

Decedent died on July 24, 1965. Her last will and testament, executed on April 23, 1965, and admitted to probate in due course after her death, provided, in pertinent part, as follows:

FIFTH: Whereas, heretofore I made a bequest to VICTOR R. WOLDER or to his estate if he predeceases me, certain shares of preferred stock and certain shares of common stock of Schering Corporation, and whereas I have heretofore disposed of the preferred stock and now own the common stock, now, therefore, I make the following provisions for his benefit and that of his estate if he predeceases me:

(a) I give and bequeath to VICTOR R. WOLDER, or, if he predeceases me, to his estate (or to such person or persons as he may appoint by his Last Will and Testament) the sum of Fifteen Thousand Eight Hundred Forty-Five ($15,845.00) Dollars.

(b) Further, I am now the owner of seven hundred fifty (750) shares of ($1.00 par value) common stock of Schering Corporation. It is my intention to give and bequeath to said VICTOR R. WOLDER, or his estate, if he predeceases me, said Schering Corporation stock which I now own and any stock or proceeds from its disposition which I may hereafter receive resulting therefrom. Therefore, I give and bequeath to said VICTOR R. WOLDER or to his estate if he shall predecease me (or to such person or persons as he may appoint by his Last Will and Testament) (a) seven hundred fifty (750) shares of common stock ($1.00 par value) of Schering Corporation, which stock I

now own, and (b) if the said Schering Corp. shall hereafter issue stock dividends, warrants or rights or shall be refinanced, recapitalized, reorganized, merged or consolidated, or if any stock I at any time own in said corporation shall be split or if any such stock be exchanged for any other stock, or if I shall exercise any warrants or rights or my conversion rights under the preferred stock, such other or additional shares or securities or rights as I shall at any time hereafter own or acquire or be entitled to by virtue of my ownership of the aforementioned shares in the Schering Corporation; and (c) if any or all of said stock, securities, warrants or rights which I now own or hereafter acquire are disposed of during my life, then, with respect to the stock, securities, warrants and rights disposed of, an amount equivalent to the worth of such stock or securities, warrants or rights so disposed of, determined at the greater of their worth at the date or dates of their disposition or the greater of the worth of the original shares included in certain White Laboratories, Inc. Class "B" stock owned by me on October 3, 1947, before it was merged with Schering Corporation.

At the time of decedent's death, the Schering stock had a fair market value of $46,945.31.

In 1966, the residuary legatees under the will, William Lum (the decedent's grandson) and the American Cancer Society, objected to payment of the legacy to Wolder on the ground that the payment constituted a debt and Wolder, as executor, was required to prove the validity of the obligation before distribution was made. The Honorable S. Samuel DiFalco, Surrogate, New York County, held that Wolder was entitled to his bequest without such proof. Subsequently, The Honorable Samuel J. Silverman, Surrogate, New York County, also held that Wolder was "entitled to the benefits of the bequest under Article Fifth of the will."

Opinion of Tax Court in related case involving the Estate of Marguerite K. Boyce

The petitioners deducted from the decedent's gross estate the sum of $62,790.31 (comprised of $46,945.31 in Schering stock and $15,845 in cash) as a debt due and owing to Wolder at the time of decedent's death.

OPINION

In his brief in this case, respondent states:

> In the event that the case of Victor R. Wolder and Marjorie Wolder (Docket No. 297-70) is decided in favor of respondent, and the Court finds that the distribution is includible in Mr. Wolder's gross income pursuant to section 61 of the Internal Revenue Code of 1954; respondent would then agree that the deduction claimed by petitioners in the instant case is allowable pursuant to section 2053 of the Internal Revenue Code of 1954.

We have this day decided that the benefits received by Wolder under Article *FIFTH* of the will constituted compensation for services taxable to him under section 61. Victor R. Wolder, 58 T.C. (Sept. 1972). In view of respondent's concession, we find that petitioners are entitled to the claimed deduction. Consequently, for the purposes of this case. we need not reach the question whether Wolder necessarily had the status of a legatee under New York law and whether the claimed deduction would thereby be precluded. Compare Beecher v. United States, 280 F.2d 202 [6 AFTR 2d 6113 (C.A. 3, 1960); Nashville Trust Co. v. Commissioner, 136 F.2d 148 [31 AFTR 105] (C.A. 6, 1943); Estate of Annie Feder, 22 T.C. 30 (1954); Estate of Walter Thiele, 9 T.C. 473 (1947); Estate of George Rice, 7 T.C. 223 (1946); Rev. Rul. 60-247, 1960-2 C.B. 272.

Decision will be entered under Rule 50.

Opinion of Surrogate DiFalco

SURROGATE'S COURT–COUNTY OF NEW YORK

Index No. 5120-1965

In the Matter of the Application of VICTOR R. WOLDER and MANUFACTURERS HANOVER TRUST COMPANY for an order directing payment of monies to VICTOR R. WOLDER,

and

In the Matter of the Application of WILLIAM B. LUM, a residuary legatee to compel the refunding of certain shares of stock,

Both Matters concerning the Estate
of MARGUERITE K. BOYCE, deceased.

[Law Journal September 14, 1966]

SURROGATE'S COURT

By Mr. Surrogate DiFalco.

–ESTATE OF MARGUERITE K. BOYCE–

The executors petition for permission to pay the individual executor a general legacy bequeathed to him in paragraph fifth of the will. This unusual application is made because the two residuary legatees have advised the executors that such payment without court approval would be improper and one of them has threatened to challenge any different course of conduct. The corporate executor has therefore refused to join in payment of the legacy without court approval.

Under the text of the will of the testatrix, the legacy is ab-

solute, unconditional and unqualified. It is conceded, however, that in 1947 the decedent and the individual executor (her attorney) entered into a written agreement which recited that the decedent was the owner of specified shares of stock of substantial value, which she had acquired as part of a settlement of an action against her husband, wherein the attorney had rendered valuable legal services. The contract further recited that the attorney had for some time then past rendered other valuable legal services to the decedent without charge, that the decedent wished to obtain present and future legal services from the attorney without current charges, that the decedent was desirous of paying for such services by means of a legacy to the attorney of the shares of stock or their proceeds, and that the attorney was willing to render such services for such compensation. The attorney obligated himself to render such legal services as the decedent might require from time to time, without billing her currently for such services. The decedent agreed to make a codicil to her will in text set forth in the contract, which, in effect, bequeathed to the attorney the shares of stock or their proceeds, and she promised that at all times thereafter she would include in her will a provision substantially identical with that set forth in the contract. The will which was admitted to probate is dated April 23, 1965, which is more than eighteen years after the making of the original agreement. The decedent died on July 24, 1965, three months after making her last will. In the fifth paragraph she referred to her prior bequests of the shares of stock and to the fact that she had disposed of certain of the shares. Subparagraph (a) follows immediately with a general legacy of $15,845 to the attorney. In subparagraph (b) she bequeathed to him specified shares of common stock of a corporation different from the one mentioned in the agreement. The will does not in any way refer to any agreement, to any services rendered or to be rendered by the attorney, or to any conditions

or qualifications of any kind. It simply sets forth a general legacy and a specific legacy in unqualified terms. The petition explains the reason why the legacies are in different terms than were set forth in the agreement, alleging that the sum of $15,845 and the specified shares of common stock were the ultimate proceeds of the original shares of stock. The point is not of importance because both testatrix and legatee were fully satisfied with the testamentary provision. The residuary legatees contend that the will merely provides for payment of a debt owed by the decedent to the attorney-executor, and they take the position that he is not entitled to payment until he proves the debt in accordance with the requirements of section 212, Surrogate's Court Act.

The testatrix could have made a conditional legacy to her attorney, expressing the gift in such terms as to make it effective only upon full performance of a stated condition. She did not do so. Courts will not imply a condition in a legacy unless "such intent affirmatively appears, either from the language of the gift, or from the will as a whole, when read in the light of the surrounding circumstances" (5 Page on Wills, Bowe-Parker Rev. sec. 44.2, p. 399). Legacies in satisfaction of a debt owed by a testator (6 Page on Wills, supra, secs. 57.9, 57.10, p. 346-352) and legacies made in compliance with contract obligations (id, sec. 57.11, p. 352) are made not infrequently. "A gift may be by will in satisfaction of testator's debt, and still be technically a legacy so as not to be subject to the rules respecting the proof of claims" (6 Page on Wills, supra, p. 346). Whether it satisfies the debt in full or only pro tanto and whether the legatee is put to an election, have been the subject of much litigation. Those issues are not of moment here. In the present case, the testatrix fully and completely performed the promise which she had made in the contract. The legatee accepts the legacy without qualification or condition. The legacy is likewise absolute, and does not

require the legatee to prove rendition of services, value of services or performance of any contractual obligation.

While section 212, Surrogate's Court Act, prohibits an estate representative from satisfying his own claim or demand out of the property of the decedent until the claim has been proved and allowed by the surrogate, no rule of law prevents an executor from satisfying his general or specific legacy, provided that the prior or equal rights of others are respected. The rule embodied in section 212 has been characterized as a wholesome and salutary rule "because of the adverse status of the executor as claimant and as trustee of the fund." (Matter of Maas, 38 N.Y.S. 2d 261, 265; Matter of Beare, 122 Misc. 519, 522, aff'd 214 App. Div. 723.) This "adversity of interest disqualifies him from acting as both plaintiff and judge." (Matter of Johnson, 14 Misc. 2d 138, 143.) The situation is different in the case of a legacy unqualified, unconditional, and unfettered. There is nothing for the legatee to prove and nothing for the executor to judge. In the pending case there is no possible question of priority or preference in payment of legacies or of abatement of any legacy because of insufficiency of assets. Indeed the residuary legatees have received very substantial payments on account of their residuary legacies, and although they challenge the statement that all other general legacies have been paid, they are hardly in a position to object to satisfaction of any general legacy on the ground of insufficiency of assets. The general legacy being thus payable absolutely, there is nothing for the legatee to prove and nothing for the court to pass upon.

The pleadings do not touch upon the question of performance of the contract or of any breach, that is, the petition does not allege full performance of the 1947 contract by the petitioner and the answers do not allege any failure of performance on the part of petitioner. Both sides have submitted the matter

as a question of law, namely, whether or not the petitioner must prove full performance of the contract as a prerequisite to collection of his legacy. The court has nevertheless considered the question of possible breach and its relation to the legacy and to executorial duties, even though in this case the indisputable facts (the long time that elapsed between the contract and the final will and the short period of time between that will and the day of death) make it clear that if there could be any breach, it was either waived or must be in a matter very minor and subordinate. The legacy is not made conditional upon rendition of services. If it nonetheless be assumed that the legacy was in fact attributable solely to the obligation imposed by the contract (cf. Matter of Whyte, 123 N.Y.S. 21 846, at page 848, aff'd 283 App. Div. 947, leave to appeal denied 307 N.Y. 942), the testatrix would be in a position similar to that of a person who had paid in advance and in full for services rendered and to be rendered. If there be a breach of contract to render such services, the person having paid in full could demand restitution or damages (5 Williston on Contracts, Dev Ed., section 1455; 5 Corbin on Contracts, section 1120), but where restitution is demanded, equitable considerations must necessarily shape the relief granted (Rescission as Available Remedy, 112 A.L.R. 670, 717 et seq.; Williston, supra, sec. 1457). The recitals of the 1947 contract make it clear that the consideration was for valuable services rendered in the past and hence any possible breach could not go to the entire consideration (Rosenwasser v. Blyn Shoes, Inc., 246 N.Y. 340, 346). Thus there can be no question of total restitution but, at the very most, only a question of damages for partial breach.

The right of the legatee to his legacy is one thing; the obligation of an executor to the estate is another. When any legatee is indebted to the estate, there is a setoff of legacy and debt, and a personal representative is bound to retain so much of the

legacy as is required to satisfy the debt. That is true of his own debt, as it is of the debt of any other legatee, and it is equally true whether the debt be related to the legacy or wholly and completely separate from it. He must report in his accounting any debt which he owns to the estate as an asset of the estate (Surr. Ct. Act, secs. 203, 212). Failure to report such a debt would furnish grounds for objection to his account. Any interested person may raise any issue of fact that is justified. To say, however, that every personal representative must, as a prerequisite to collection of his legacy, come into court and prove to the satisfaction of the court that he is not indebted in any way to the estate, would be to impose a burden upon every estate and impede estate administration.

The court accordingly holds that the executor-legatee is entitled to payment of the legacy bequeathed to him in the will and is not required, as a condition of such payment, that he prove a claim that he might otherwise have against the estate.

Submit order on notice accordingly.

– ESTATE OF MARGUERITE K. BOYCE –

For the reasons stated in the decision published simultaneously herewith the application to compel the legatee to return the shares of stock which were bequeathed to him, is denied.

Submit order on notice accordingly.

Opinion of Surrogate Samuel Silverman

SURROGATE'S COURT—NEW YORK COUNTY

Index No. P 5120/65

In the Matter of the Application of Victor R. Wolder, co-executor of the Last Will and Testament of

MARGUERITE K. BOYCE,

Deceased,

for a Determination and Construction and Effect of paragraph "SECOND" contained in the Last Will and Testament of said Decedent.

[Filed August 7, 1970]

Estate of Marguerite K. Boyce

This is a proceeding by executors for a construction of the tax provision of decedent's will, together with a cross-petition to vacate the decree of probate insofar as it relates to the tax provision and, as it now appears, requests by the residuary legatees that the individual executor should not participate in the estate.

In 1947, decedent was a widow in her early sixties; petitioner, Victor Wolder, one of the executors and an attorney, was in his thirties. Mr. Wolder was decedent's attorney having rendered various services for her before that time. All previous services had been paid for and nothing was owed Mr. Wolder on account of services rendered before 1947, though he had rendered certain relatively minor services in 1947 for which he had not been compensated. Decedent had certain financial assets

worth perhaps $150,000 or so and lived on the income from her investments.

Apparently she was reluctant to devote any of her income during her lifetime to the payment of lawyers' fees. Accordingly, Mr. Wolder suggested to decedent that they enter into a contract under which he would render services to decedent during their joint lives, in return for which decedent would agree to leave to him in her will certain shares of White Laboratories stock, or if she disposed of that stock during her lifetime, then she would leave him either the proceeds of the stock or its value at the time of the contract, whichever was greater; if Mr. Wolder should die before decedent, the legacy would be payable to Mr. Wolder's estate. Decedent agreed to this. Mr. Wolder suggested that she should have some independent representation and he recommended that she be represented by another attorney, Mr. Newman, (whose firm represents Mr. Wolder in the present proceeding) and with whom Mr. Wolder had had some association on an office sharing or landlord-tenant relationship, as well as some minor professional relationship. Mr. Wolder prepared a long-hand draft of an agreement and a proposed codicil to decedent's will and sent them to Mr. Newman who reviewed them and made some minor changes, largely stylistic. Rather significantly, the draft prepared by Mr. Wolder said that he would render services to decedent that decedent wanted "legal or otherwise"; Mr. Newman, representing decedent in connection with this contract, suggested that the nature of the services be more clearly outlined and in discussion between him and Mr. Wolder they agreed that the services be limited to legal services. Mr. Newman then met with decedent who made a minor change in the agreement and signed it and executed the codicil to the will. This was the only meeting that Mr. Newman ever had with decedent (except for a previous occasion when he had apparently

acted as a witness to a will of decedent drawn by Mr. Wolder who was then a tenant in Mr. Newman's law office).

So far as appears, decedent never had any attorney but Mr. Wolder since 1947. She died in 1965, and Mr. Wolder survived her. During the intervening 18 years Mr. Wolder rendered such legal services as she required, which were of the type that one might expect might be required by an elderly widow not in business, i.e. he drew wills for her; when there was a problem about her apartment lease he looked at the lease and sometimes made suggestions. Decedent had a custodian account with Manufacturers Hanover Trust Co. (who is a co-executor here) and the bank used to prepare her income tax returns which Mr. Wolder would apparently sometimes then look at though it does not appear that he undertook any real professional responsibility in connection with those returns. He apparently gave investment advice to some extent. In addition, it is fairly clear that Mr. Wolder rendered a sort of psychological supportive services that lawyers not infrequently render to elderly widows who need some one to rely upon.

The White Laboratories stock involved was split and exchanged for Schering Corporation stock part of which was redeemed for cash. As these changes were made the will was changed to reflect these changes. The will which has been admitted to probate was executed April 23, 1965. Paragraph FIFTH leaves to Mr. Wolder the Schering stock and $15,845, the proceeds of the redemption of part of the Schering stock. The total value of this bequest under paragraph FIFTH was said to be approximately $62,000 at the time of decedent's death in July 1965.

In the 18 years between the 1947 contract and decedent's death decedent executed a number of wills and codicils including

wills and codicils in 1948, 1951, 1953 (2), 1957 (2), 1963 and finally the will of April 23, 1965 which was admitted to probate. In all of these, Mr. Wolder acted as decedent's attorney and drafted the wills or codicils. On at least one occasion, however, as a matter of convenience, another attorney whose office was in the same building as Mr. Wolder and who was acting as a witness supervised the formal execution of the will. In some cases, the chief purpose of the new will was to reflect changes that had taken place in the status of the White Laboratories stock.

* * *

Certain other changes were made in the 1965 will including a provision that Mr. Wolder, in addition to attorney's fees, should be compensated for services as executor. Previous wills had provided that he should not be compensated for services as executor.

Decedent had no outside advice in connection with the 1965 will or the changes therein. Mr. Wolder was her only attorney and he suggested and drafted the provisions. The witnesses to the will were two employees in Mr. Wolder's office and decedent's housekeeper. Decedent at this time was over 80 years of age and physically rather infirm, though apparently mentally quite competent. Her vision was by now quite poor (though she was by no means blind); she had a history of glaucoma and small cataracts and she had apparently substantially ceased reading. Mr. Wolder read the will aloud to her and she indicated agreement at each point. Her signature on the will is obviously very shaky and infirm. She died on July 24, 1965.

The residuary legatees in the 1965 will are decedent's grandson, Mr. William Lum, and American Cancer Society. Mr. Lum is now a New Jersey lawyer aged about 30. Decedent had not seen him nor had he been in contact with her since he was

about 3½ years old, at which time his father, decedent's son, had died and his mother remarried.

In 1966, the residuary legatees objected to the payment of the legacy under paragraph FIFTH to Mr. Wolder on the ground that this was the payment of a debt to Mr. Wolder and as Mr. Wolder was an executor, the validity of the debt should be proved to the Surrogate's satisfaction under then S.C.A. §212 before the legacy was paid. Surrogate DiFalco held that this section was inapplicable to a case where the decedent left a legacy to the executor, since she could have left such a legacy even if there were no valid debt and accordingly he directed the payment of the legacy. N.Y.L.J. Sept. 14, 1966.

1. In various ways the residuary legatees contend that Mr. Wolder should not receive the benefit of the legacy under paragraph Fifth, i.e. the Schering stock and the $15,845.

I must say that I have considerable doubts as to the propriety of a contract such as that of October 1947 which puts a lawyer in the position of betting against his client's living long.

However, we are not here concerned with the enforceability of that contract, as we would be, for example, if the testatrix attempted to repudiate it. Here the testatrix chose not to repudiate the contract. She chose to make a legacy to Mr. Wolder, which she could have made without any contract. That, indeed, seems to be the basic point of Judge DiFalco's 1966 decision that the executor was entitled to the payment of his legacy without proving that he had a valid enforceable claim against the decedent under the contract.

The basic arrangement and the first testamentary provision for Mr. Wolder were made in 1947. The provisions in the later wills essentially merely continue to carry that provision into ef-

fect, taking account of changes in the corporate structure of the corporations involved.

In making the first codicil in 1947 with this provision, decedent did have some outside legal advice by some one other than Mr. Wolder.

She lived 18 years after that, during which time she had ample opportunity to change the provision if she had wished to do so. She made seven wills and codicils after 1947 so that this provision kept coming to her attention. The provision is plainly stated in the will in a separate paragraph and it could not be overlooked by the testatrix. Nevertheless, in the 18 years she did not change the provision. It seems clear that it was her settled and informed intention to make this bequest to Mr. Wolder.

After decedent's death, the representatives of the residuary legatee-grandson, William Lum, experienced lawyers, inquired into the matter. They learned about the 1947 contract. They saw the provision in paragraph Fifth of the will for the legacy to Mr. Wolder. They came to the conclusion that this provision represented the decedent's desires and accordingly the grandson, on the advice of his representatives, consented to probate and the will was admitted to probate.

While it is true that the other residuary legatee, the American Cancer Society, was not cited in the probate proceedings, not being a distributee, it in fact did know about the will over a month before the will was admitted to probate. The will plainly states the gift to Mr. Wolder and that he was her executor and attorney. The Society had a right to object to the gift to Mr. Wolder (former Surr. Ct. Act, § 147) and it failed to do so.

By early 1966, the lines were drawn. Mr. Lum and the attorney for American Cancer Society were deeply suspicious of Mr.

Wolder's relationship with the decedent and to the will. But for over four years thereafter, no attack was made upon this bequest (except the request that Judge DiFalco pass upon the validity of the obligation to Mr. Wolder under the 1947 contract as a pre-requisite to the payment of this bequest to Mr. Wolder).

In the circumstances, I hold that Mr. Wolder is entitled to the benefits of the bequest under Article Fifth of the will.

* * *

August 6, 1970.

Statutes and Regulations

Gross Income Defined

Statute

"Sec. 61 (1954 Code). (a) General Definition.—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, and similar items; * * *

"(b) Cross References.—For items specifically included in gross income, see part II (sec. 71 and following). For items specifically excluded from gross income, see part III (sec. 101 and following).

Regulations

"Sec. 1.61-1. Gross income—(a) General Definition. Gross income means all income from whatever source derived, unless excluded by law. Gross income includes income realized in any form, whether in money, property, or services. Income may be realized, therefore, in the form of services, meals, accommodations, stock, or other property, as well as in cash. Section 61 lists the more common items of gross income for purposes of illustration. For purposes of further illustration, Section 1.61-14 mentions several miscellaneous items of gross income not listed specifically in section 61. Gross income, however, is not limited to the items so enumerated.

"(b) Cross-references. Cross references to other provisions of the Code are to be found throughout the regulations under section 61. The purpose of these cross references is to direct attention to the more common items which are included or excluded from gross income entirely, or treated in some special

manner. To the extent that another section of the Code or of the regulations thereunder, provides specific treatment for any item of income, such other provision shall apply notwithstanding section 61 and the regulations thereunder. The cross references do not cover all possible items.

"(1) For examples of items specifically included in gross income, see Part II (section 71 and following), sub-chapter B, Chapter 1 of the Code.

"(2) For examples of items specifically excluded from gross income, see part III (section 101 and following), sub-chapter B, Chapter 1 of the Code."

Gifts and Bequests

Statute

"Sec. 102 (1954 Code). (a) General Rule—Gross income does not include the value of property acquired by gift, bequest, devise, or inheritance. * * * "

Regulations

"Sec. 1.102-1. Gifts and inheritances—(a) General rule. Property received as a gift, or received under a will or under statutes of descent and distribution, is not includible in gross income, although the income from such property is includible in gross income. * * * "

Basis of Property Acquired from a Decedent

Statute

"Sec. 1014 (1954 Code). (a) In General.—Except as otherwise provided in this section, the basis of property in the hands

of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be the fair market value of the property at the date of the decedent's death, or, in the case of an election under either section 2032 or section 811(j) of the Internal Revenue Code of 1939 where the decedent died after October 21, 1942, its value at the applicable valuation date prescribed by those sections.

"(b) Property acquired from the Decedent.—For purposes of subsection (a), the following property shall be considered to have been acquired from or to have passed from the decedent:

(1) Property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent;
* * * * "

Regulations

"Sec. 1.1014-1. Basis of property acquired from a decedent—(a) General rule. The purpose of section 1014 is, in general, to provide a basis for property acquired from a decedent which is equal to the value placed upon such property for purposes of the Federal estate tax. Accordingly, the general rule is that the basis of property acquired from a decedent is the fair market value of such property at the date of the decedent's death, or, if the decedent's executor so elects, at the alternate valuation date prescribed in section 2032, or in section 811(j) of the Internal Revenue Code of 1939. Property acquired from a decedent includes, principally, property acquired by bequest, devise, or inheritance, and in the case of decedents dying after December 31, 1953, property required to be included in determining the value of the decedent's gross estate under any provision of the Internal Revenue Code of 1954 or the Internal

Revenue Code of 1939. The general rule governing basis of property acquired from a decedent, as well as other rules prescribed elsewhere in this section, shall have no application if the property is sold, exchanged, or otherwise disposed of before the decedent's death by the person who acquired the property from the decedent. For general rules on the applicable valuation date where the executor of a decedent's estate elects under section 2032, or under section 811(j) of the Internal Revenue Code of 1939, to value the decedent's gross estate at the alternate valuation date prescribed in such sections, see paragraph (e) of Section 1.1014-3.

"(b) Scope and application. With certain limitations, the general rule described in paragraph (a) of this section is applicable to the classes of property described in paragraphs (a) and (b) of Section 1.1014-2. Special basis rules with respect to the basis of certain other property acquired from a decedent are set forth in paragraph (c) of Section 1.1014-2. These special rules concern certain stock or securities of a foreign personal holding company and the surviving spouse's one-half share of community property held with a decedent dying after October 21, 1942, and on or before December 31, 1947. In this section and Sections 1.1014-2 to 1.1014-6, inclusive, whenever the words 'property acquired from a decedent' are used, they shall also mean 'property passed from a decedent', and the phrase 'Person who acquired it from the decedent' shall include the 'person to whom it passed from the decedent.' * * *"

"Sec. 1.1014-2. Property acquired from a decedent—(a) In general. The following property, except where otherwise indicated, is considered to have been acquired from a decedent and the basis thereof is determined in accordance with the general rule in Sec. 1.1014-1:

Statutes and Regulations
Basis of Property Acquired from a Decedent

"(1) Without regard to the date of the decedent's death, property acquired by bequest, devise or inheritance, or by the decedent's estate from the decedent, whether the property was acquired under the decedent's will or under the law governing the descent and distribution of the property of decedents.
* * * "

"(b) Property acquired from a decedent dying after December 31, 1953—(1) In General. In addition to the property described in paragraph (a) of this section, and except as otherwise provided in subparagraph (3) of this paragraph, in the case of a decedent dying after December 31, 1953, property shall also be considered to have been acquired from the decedent to the extent that both of the following conditions are met: (i) the property was acquired from the decedent by reason of death, form of ownership, or other conditions (including property acquired through the exercise or non-exercise of a power of appointment), and (ii) the property is includible in the decedent's gross estate under the provisions of the Internal Revenue Code of 1954, or the Internal Revenue Code of 1939, because of such acquisition. The basis of such property in the hands of the person who acquired it from the decedent shall be determined in accordance with the general rule in Sec. 1.1014-1. See, however, Sec. 1.1014-6 for special adjustments if such property is acquired before the death of the decedent. See also subparagraph (3) of this paragraph for a description of property not within the scope of this paragraph.

(2) Rules for the application of subparagraph (1) of this paragraph. Except as provided in subparagraph (3) of this paragraph, this paragraph generally includes all property acquired from a decedent, which is includible in the gross estate of the decedent if the decedent died after December 31, 1953. It is not

necessary for the application of this paragraph that an estate tax return be required to be filed for the estate of the decedent or that an estate tax be payable. Property acquired prior to the death of a decedent which is includible in the decedent's gross estate, such as property transferred by a decedent in contemplation of death, and property held by a taxpayer and the decedent as joint tenants or as tenants by the entireties is within the scope of this paragraph. Also, this paragraph includes property acquired through the exercise or non-exercise of a power of appointment where such property is includible in the decedent's gross estate. It does not include property now includible in the decedent's gross estate such as property not situated in the United States acquired from a non-resident who is not a citizen of the United States."

"Sec. 1.1014-3. Other basis rules–(a) Fair market value. For purposes of this section and Sec. 1.1014-1, the value of property as of the date of the decedent's death as appraised for the purpose of the Federal estate tax or the alternate value as appraised for such purpose, whichever is applicable, shall be deemed to be its fair market value. If no estate tax return is required to be filed under section 6018 (or under section 821 or 864 of the Internal Revenue Code of 1939), the value of the property appraised as of the date of the decedent's death for the purpose of State inheritance or transmission taxes shall be deemed to be its fair market value and no alternate valuation date shall be applicable. * * * "

"Sec. 1.1014-4. Uniformity of basis; adjustment to basis–(a) In General. (1) The basis of property acquired from a decedent, as determined under section 1014(a), is uniform in the hands of every person having possession or enjoyment of the property at any time under the will or other instrument or

under the laws of descent and distribution. The principle of uniform basis means that the basis of the property (to which proper adjustments must, of course, be made) will be the same, or uniform, whether the property is possessed or enjoyed by, the executor or administrator, the heir, the legatee or devisee, or the trustee or beneficiary of a trust created by a will or an inter vivos trust. In determining the amount allowed or allowable to a taxpayer in computing taxable income as deductions for depreciation or depletion under section 1016(a)(2), the uniform basis of the property shall at all times be used and adjusted. The sale, exchange, or other disposition by a life tenant or remainderman of his interest in property will, for purposes of this section, have no effect upon the uniform basis of the property in the hands of those who acquired it from the decedent. Thus, gain or loss on sale of trust assets by the trustee will be determined without regard to the prior sale of any interest in the property. Moreover, any adjustment for depreciation shall be made to the uniform basis of the property without regard to such prior sale, exchange, or other disposition.

"(2) Under the law governing wills and the distribution of the property of decedents, all titles to property acquired by bequest, devise, or inheritance relate back to the death of the decedent, even though the interest of the person taking the title was, at the date of the death of the decedent, legal, equitable, vested, contingent, general, specific, residual, conditional, executory, or otherwise, Accordingly, there is a common acquisition date for all titles to property acquired from a decedent within the meaning of section 1014, and, for this reason, a common or uniform basis for all such interests. For example, if distribution of personal property left by a decedent is not made until one year after his death, the basis of such property in the hands of the legatee in its fair market value at the time when the decedent

died, and not when the legatee actually received the property. If the bequest is of the residue to trustees in trust, and the executors do not distribute the residue to such trustees until five years after the death of the decedent, the basis of each piece of property left by the decedent and thus received in the hands of the trustees, is its fair market value at the time when the decedent dies. If the bequest is to trustees in trust to pay to A during his lifetime the income of the property bequeathed, and after his death to distribute such property to the survivors of a class, and upon A's death the property is distributed to the taxpayer as the sole survivor, the basis of such property, in the hands of the taxpayer, is its fair market value at the time when the decedent died. The purpose of the Code in prescribing a general uniform basis rule for property acquired from a decedent is, on the one hand, to tax the gain, in respect of such property, to him who realizes it (without regard to the circumstances that at the death of the decedent it may have been quite uncertain whether the taxpayer would take or gain anything); and, on the other hand, not to recognize as gain any element of value resulting solely from the circumstance that the possession or enjoyment of the taxpayer was postponed. Such postponement may be, for example, until the administration of the decedent's estate is completed, until the period of the possession or enjoyment of another has terminated, or until an uncertain event has happened. It is the increase or decrease in the value of property reflected in a sale or other disposition which is recognized as the measure of gain or loss. * * * "

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1614

VICTOR R. WOLDER AND MARJORIE WOLDER,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Pursuant to an agreement entered into in 1947, petitioner, a lawyer, agreed to render such legal services for Marguerite K. Boyce as she might personally require during her lifetime and not to bill her for such services. In turn, Mrs. Boyce agreed to bequeath to petitioner certain shares of stock (Pet. App. 4a). Both the Tax Court (Pet. App. 14a-31a) and the court of appeals (Pet. App. 1a-12a) held that the fair market value of the shares and an amount of cash[1] bequeathed to petitioner

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[1]The cash bequest was made because the shares originally specified in the will were exchanged for common and convertible preferred shares of another corporation as a result of a merger. The convertible preferred shares were redeemed for $15,845, the amount of the cash bequest (Pet. App. 4a).

were includible in petitioner's gross income under Section 61(a) of the Code, and were not exempt as a bequest under Section. 102.[2]

Petitioner renews the argument (Pet. 10-13), rejected by both courts below, that his receipt of stock and cash from the estate of Marguerite K. Boyce was a tax-free "bequest" under Section 102(a) of the Code. He asserts that the decision below conflicts with *United States* v. *Merriam,* 263 U.S. 179, and *Lyeth* v. *Hoey,* 305 U.S. 188.

Section 61(a) of the Code defines gross income as "all income from whatever source derived." The provision specifically includes "[c]ompensation for services" within the definition. Section 61(a)(1). One narrow statutory exception to this broad statutory rule of inclusion is property acquired by gift or bequest. Section 102(a). But the teachings of this Court make clear that whether an item is a gift or bequest for federal income tax purposes depends upon whether the bequest represents a *bona fide* gift or whether it is merely a method for paying compensation. *Commissioner* v. *Duberstein,* 363 U.S. 278; *Hort* v. *Commissioner,* 313 U.S. 28, 31; *Cotnam* v. *Commissioner,* 263 F. 2d 119 (C.A. 5). As the Court has noted, a gift in the statutory sense proceeds from a "detached and disinterested generosity" (*Commissioner* v. *LoBue,* 351 U.S. 243, 246) and "out of affection, respect, admiration,

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[2]Although Mrs. Boyce died in 1965, petitioner did not actually receive the stock and cash until the following year. The Tax Court held that petitioner constructively received the stock and cash in 1965, a year which was not before it (Pet. App. 28a). The court of appeals reversed on this point, concluding that the proper year for inclusion of the stock and cash in petitioner's gross income was 1966. It accordingly remanded the case to the Tax Court for a determination of the exact date upon which petitioner received the stock so that its value could be ascertained as of that date (Pet. App. 11a, n. 5).

charity or like impulses" (*Robertson* v. *United States,* 343 U.S. 711, 714). Since the resolution of these questions depends upon the donor's intent, the Court reaffirmed in *Duberstein* that the distinction between gift and compensation is essentially factual so that the findings of the trier of fact must stand unless clearly erroneous (363 U.S. at 289-291).

Here, it is undisputed that the stock and cash transferred to petitioner were in return for legal services rendered. Based on this evidence, the courts below correctly held that this testamentary transfer was taxable compensation to petitioner for services under Section 61 and not a tax-free bequest under Section 102(a). *Cotnam* v. *Commissioner, supra; Mariani* v. *Commissioner,* 54 T.C. 135; *Cohen* v. *United States,* 241 F. Supp. 740 (E.D. Mich.).

Contrary to petitioner's contention (Pet. 11), the fact that the transfer might be characterized as a bequest under New York law is not controlling for federal income tax purposes. This Court has indicated that the term "gift" in Section 102(a) and its predecessor provisions is a word of art unrelated to state law considerations. Thus, for example, a voluntarily executed transfer of property by one to another, without any consideration or compensation therefor, is not necessarily a "gift" within the meaning of the income tax statute, even though it may be a common law gift. See *Old Colony Trust Co.* v. *Commissioner,* 279 U.S. 716, 730. See also *United States* v. *Mitchell,* 403 U.S. 190, 197; *Commissioner* v. *Duberstein, supra,* 363 U.S. at 285; *Morgan* v. *Commissioner,* 309 U.S. 78, 80-81.

Petitioner's reliance (Pet. 10) upon *United States* v. *Merriam,* 263 U.S. 179, is misplaced. There, the testator made cash bequests to persons named in his will as

executors in lieu of compensation they would have otherwise been entitled to under state law. The Court held that these legacies were tax-exempt bequests under the predecessor of Section 102(a) because they were not given for services to be performed by the executors, but rather for simply meeting the qualifications for status as an executor. Thus, as the court of appeals stated, whatever remaining vitality the *Merriam* holding may have in the light of *Duberstein* (see Pet. App. 6a-7a, n. 4), the testamentary transfers made to petitioner were founded upon a promise for payment for services rendered by petitioner and not for simply satisfying the qualifications as an executor.[3]

Finally, petitioner asserts (Pet. 13-14) a conflict between the decision below and the basis rules of Section 1014. He urges that he is entitled to capital gains treatment upon the increase in value of the stock between Mrs. Boyce's death in 1965 and his receipt of it in 1966. The rule of Section 1014, providing that the basis of property in the hands of a person acquiring it from a decendent is its fair market value as of the decedent's death, applies to "[p]roperty acquired by bequest, devise, or inheritance * * *." Section 1014(b)(1). But without the requisite "sale or exchange" of a capital asset (see Section 1222), petitioner is not entitled to capital gains treatment on any portion of the value of the stock.

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[3] *Lyeth* v. *Hoey*, 305 U.S. 188, cited by petitioner (Pet. 12) as conflicting with the decision below, is also inapposite. There, the Court held that property received by an heir under an agreement settling a will contest is a non-taxable bequest. Nor does *Jacobs* v. *Commissioner*, 34 F. 2d 233 (C.A. 8), certiorari denied, 280 U.S. 603 (Pet. 13), conflict with this decision. That case held only that the payment of a claim by a widow who elects against the will is not a deductible "claim" against the estate for estate tax purposes.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.[4]

ROBERT H. BORK,
Solicitor General.

JUNE 1974.

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[4]Because both courts below held that the value of the stock and cash were income to petitioner, they held in *Estate of Boyce* v. *Commissioner*, P.H. Memo T.C., par. 72,204, that the estate was entitled to an estate tax deduction for these items as a claim against the estate under Section 2053(a)(3) (Pet. App. 32a-36a, 4a, n. 2, 11a). The Commissioner has filed a petition for a writ of certiorari in that case (No. 73-1752), requesting that certiorari be granted only if the Court grants the petition in this case. The Commissioner filed a petition in the *Estate of Boyce* case only to preserve his alternative position, taken to protect the revenue, that in the event the cash and stock are deemed to be a tax-free bequest, the estate is not entitled to a deduction for a claim.